Supreme Court, U.S.
FILED

01 285 AUG 2001

No.

In the Supreme Court of the United States

MARYELLEN THOMS, WARDEN, PETITIONER

v.

MARIO ROSALES-GARCIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent is a national of Cuba who came to the United States as part of the Mariel boatlift in 1980 and was ordered excluded from the United States in 1987. He was initially released on immigration parole in 1980, but his parole was revoked in 1986. He was paroled for a second time in 1988, but that parole was revoked in 1997. Both parole revocations were because of criminal convictions in violation of his parole conditions. The questions presented are:

1. Whether respondent's detention under 8 U.S.C. 1182(d)(5)(A) (Supp. V 1999) and 8 U.S.C. 1226(e) (1994) following the second revocation of his parole in 1997 violated substantive due process, where respondent was under a final order of exclusion but his immediate deportation to Cuba was not possible because of Cuba's refusal to accept his return, and he was considered for reparole on an annual basis under the special Mariel Cuban Review Plan established by the Attorney General.

2. Whether this case is moot in light of the Immigration and Naturalization Service's reparole of respondent on March 22, 2001, to a halfway house program, and respondent's completion of the halfway house program and reentry into the community on May 16, 2001.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Warden of the Federal Medical Center in Lexington, Kentucky, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-73a) is reported at 238 F.3d 704. The opinion of the district court (App., *infra*, 74a-96a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 2001. A petition for rehearing was denied on April 16, 2001 (App., *infra*, 99a-100a). On July 12, 2001, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including August 15, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Former 8 U.S.C. 1182(d)(5)(A) (1976 ed. Supp. IV 1980) provided:

> (5)(A) The Attorney General may, except as provided in subparagraph (B), in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien, and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States.

2. Former 8 U.S.C. 1226(e) (1994) provided:

> **(e) Custody of alien**
>
> (1) Pending a determination of excludability, the Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense).
>
> (2) Notwithstanding any other provision of this section, the Attorney General shall not release such felon from custody unless the Attorney General determines that the alien may not be deported be-

cause the condition described in [8 U.S.C. 1253(g) (1994)] exists.

(3) If the determination described in paragraph (2) has been made, the Attorney General may release such alien only after—

(A) a procedure for review of each request for relief under this subsection has been established,

(B) such procedure includes consideration of the severity of the felony committed by the alien, and

(C) the review concludes that the alien will not pose a danger to the safety of other persons or to property.

3. Former 8 U.S.C. 1253(g) (1994) provided:

(g) Countries delaying acceptance of deportees

Upon the notification by the Attorney General that any country upon request denies or unduly delays acceptance of the return of any alien who is a national, citizen, subject, or resident thereof, the Secretary of State shall instruct consular officers performing their duties in the territory of such country to discontinue the issuance of immigrant visas to nationals, citizens, subjects, or residents of such country, until such time as the Attorney General shall inform the Secretary of State that such country has accepted such alien.

4. The regulations of the Immigration and Naturalization Service that currently govern parole determinations and revocations respecting respondent and other Mariel Cubans, *i.e.* "any native of Cuba who last came to the United States between April 15, 1980, and

October 20, 1980," 8 C.F.R. 212.12, are set forth at App., *infra*, 101a-106a.

STATEMENT

1. a. Respondent is a native of Cuba who arrived at the border of the United States on or around May 6, 1980, as part of the Mariel boatlift, "so known because over 120,000 undocumented Cubans departed from the Mariel Harbor en route to the United States." App., *infra*, 3a. The Immigration and Naturalization Service (INS) stopped respondent at the border and barred his entry to the United States. On May 20, 1980, the INS granted respondent immigration parole pursuant to the Attorney General's authority, under 8 U.S.C. 1182(d)(5)(A) (1976 ed. Supp. IV 1980), to parole into the United States temporarily an alien who is applying for admission. See App., *infra*, 3a. Section 1182(d)(5)(A), as it then read, provided that such parole may be granted on conditions prescribed by the Attorney General "for emergent reasons or for reasons deemed strictly in the public interest," and that "such parole of such alien shall not be regarded as an admission of the alien." 8 U.S.C. 1182(d)(5)(A) (1976 ed. Supp. IV 1980). That Section also provided that when, in the opinion of the Attorney General, the purposes of the alien's parole have been served, the alien shall forthwith be returned to custody and thereafter his case shall continue to be dealt with in the same manner as that of any other alien seeking admission to the United States. *Ibid.*

While on immigration parole, respondent engaged in a course of increasingly serious criminal activity. Respondent was first arrested in 1980 on aggravated battery charges, but the charge was dismissed. App., *infra*, 3a n.2. He was arrested for a range of other

offenses, including burglary, but not convicted. *Ibid.* His first conviction apparently was in October 1981 for marijuana possession and resisting arrest. In September 1981, he was convicted of grand theft. In 1983, he was convicted of burglary and grand larceny. In January 1986, respondent was convicted of escape. See *id.* at 4a.

b. While respondent was serving his state term of imprisonment on his escape conviction, the INS served Florida prison authorities with a detainer requesting notification of respondent's release date. Pursuant to that detainer, respondent was transferred to the custody of the INS upon completion of his state imprisonment term. On July 10, 1986, the INS revoked respondent's immigration parole pursuant to its authority under 8 U.S.C. 1182(d)(5)(A) (1982) and 8 C.F.R. 212.5(d)(2) (1986), because the INS determined that his continued parole was against the public interest and that he should be detained pending exclusion proceedings. See App., *infra*, 4a.

On the same date, the INS commenced exclusion proceedings against respondent by serving him with a notice of a hearing before an immigration judge, charging respondent with being excludable under, *inter alia*, former 8 U.S.C. 1182(a)(20) (1982), as an alien not in possession of an immigrant visa or other valid entry document. Respondent's exclusion proceedings culminated in a hearing on June 26, 1987, at which an immigration judge determined that respondent was excludable, denied his request for asylum, and ordered that he be excluded and deported from the United States. App., *infra*, 4a-5a.

The United States has not been able to effectuate respondent's 1987 order of exclusion because Cuba has not agreed to accept respondent's return. App., *infra*,

5a & n.4. The United States has consistently maintained that Cuba is obliged under international law to accept the return of its nationals who are denied admission to the United States. *Id.* at 80a. For the first several years following the 1980 Mariel boatlift, Cuba refused. In 1984, however, the United States and Cuba reached an agreement under which, *inter alia*, Cuba agreed to the repatriation of 2,746 criminal Mariel Cubans. *Id.* at 11a, 81a n.4 The list did not include respondent. *Id.* at 81a. In 1985, Cuba unilaterally suspended the agreement but, after further negotiations, the 1984 agreement was reimplemented in November 1987. The reimplementation led to violent disturbances at federal detention facilities housing Mariel Cubans. We have been informed by the INS that the United States was able to resume repatriating listed Mariel Cubans in late 1988 and currently repatriates a small group approximately ten times a year, although flights are sometimes canceled for various reasons. The most recent flight was in July 2001 and, as of that date, approximately 1,555 Mariel Cubans have been returned to Cuba under the terms of the 1984 migration agreement. See also *id.* at 81a n.4; C.A. App. 56-57.[1]

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[1] There is a long history of efforts by the United States to address the problems presented by the influx of Mariel Cubans, including expenditures of federal funds for specific purposes such as education and welfare, as well as enactment of Section 202 of the Immigration Reform and Control Act of 1986, 8 U.S.C. 1255a note (1976 ed. Supp. IV 1980), which established a mechanism for certain Cubans (and Haitians), including the Mariel Cubans who came in 1980, to adjust their status to that of lawful permanent resident. Cubans convicted of particularly serious crimes were not eligible to adjust their status. *Ibid.* We have been infomed by the INS that it has provided extensive halfway house, mental health, and drug abuse programs to assist inadmissible Mariel Cuban detainees who are paroled into the United Sates.

c. On March 3, 1988, respondent's custody status was reviewed by a panel of INS officials as provided under the Attorney General's then-recently adopted Cuban Review Plan, 8 C.F.R. 212.12, which affords detained Mariel Cubans automatic review of their custody status on an annual basis. See App., *infra*, 5a-6a n.4 (detailing Cuban Review Plan procedures and standards); *id.* at 93a-94a (same).[2] As a result of that review, the INS issued a notice of decision on April 22, 1988, informing respondent that he would be reparoled after arrangements were made for sponsorship or placement in the community, as required by the regulations. Consequently, on May 20, 1988, the INS released respondent on immigration parole for a second time. *Id.* at 5a, 75a.

During his second immigration parole, respondent again engaged in criminal activity in violation of the release conditions to which he had agreed. See C.A.

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[2] The Attorney General has exercised his authority to grant immigration parole as appropriate to Mariel Cubans through a series of administrative procedures, beginning with a status review plan that was suspended after the 1984 migration agreement was reached. On December 28, 1987, the Attorney General promulgated the Cuban Review Plan, 8 C.F.R. 212.12, which currently governs parole determinations and revocations respecting Mariel Cubans. See App., *infra*, 5a-6a n.4. At that same time, the Attorney General promulgated a regulation, 8 C.F.R. 212.13 (1999), that established independent parole review panels in the Department of Justice, and he delegated parole authority to three-member panels comprised of non-INS Department employees. Those panels provided one-time reviews to Mariel Cubans who were in custody in December 1987 and had been denied immigration parole by the INS. After the one-time reviews were completed, those panels were disbanded. Detained Mariel Cubans have since been provided automatic custody reviews under the Cuban Review Plan, 8 C.F.R. 212.12.

App. 121-122. On March 18, 1993, respondent was convicted in the United States District Court for the Eastern District of Wisconsin of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), 846. App., *infra*, 5a. He was sentenced to 63 months' imprisonment, followed by five years' supervised release. *Ibid.*

d. While respondent was serving his federal term of imprisonment, the INS lodged with the prison officials a detainer against respondent. On March 24, 1997, after review of respondent's case, the Attorney General revoked respondent's second immigration parole pursuant to 8 U.S.C. 1182(d)(5)(A) (1994 & Supp. III 1997) and 8 C.F.R. 212.12. App., *infra*, 5a, 75a. Therefore, in May 1997, upon respondent's release from federal prison, he was returned to INS custody, pursuant to 8 U.S.C. 1226(e) (1994), which requires that the Attorney General take into custody any excludable alien convicted of an aggravated felony upon the alien's release from criminal custody. App., *infra*, 6a & n.5; see p. 17 & n. 4, *infra*.

Following the revocation of respondent's second parole in 1997, the INS reviewed his custody status on an annual basis, consistent with the Cuban Review Plan. App., *infra*, 6a-7a. On November 5, 1997, the INS reviewed respondent's custody through a file review and interview. The interview panel recommended that respondent be continued in detention because of his extensive criminal record during his prior two paroles, including his escape from a work release program. That record prevented the panel from concluding at the time of review that, if released, respondent would comply with the conditions of parole and not engage in further unlawful conduct. C.A. App. 139. INS headquarters adopted that recommendation and

notified respondent on February 11, 1998, that it had concluded that his release on parole was not warranted at that time because it was not clearly evident that, if released, he was unlikely to pose a threat to the community and/or unlikely to violate the conditions of parole. App., *infra*, 6a-7a. Another review panel reached a similar recommendation in 1999 in which INS Headquarters concurred, and respondent was again denied parole on May 11, 1999.

Most recently, on May 5, 2000, a Cuban Review Panel again reviewed respondent's custody status and interviewed respondent. On July 19, 2000, the INS determined that respondent was releasable under the guidelines established by the Cuban Review Plan, 8 C.F.R. 212.12. The INS informed respondent that he would be rereleased on immigration parole for a third time when a suitable sponsorship or placement was arranged for him, and requested information from respondent to assist in that placement. App., *infra*, 7a n.7, 15a-16a. We have been informed by the INS that respondent was placed on its waiting list for a halfway house program and that he was ultimately released on immigration parole for the third time on or about March 22, 2001, to a halfway house in Miami, Florida. See Gov't C.A. Reh'g Pet. 5 (informing court of appeals of respondent's anticipated release in March 2001).

2. Meanwhile, on July 9, 1998, respondent had filed the instant action in the United States District Court for the Eastern District of Kentucky, seeking habeas corpus relief based on his claim that the INS's revocation of his parole in March 1997 and his continued detention by the INS violated due process. App., *infra*, 7a. Respondent sought immediate release on parole or, alternatively, an emergency parole hearing. *Id.* at 8a.

On May 3, 1999, the district court dismissed the petition with prejudice, holding that respondent had not demonstrated that his detention violated any statutory or constitutional rights. *Id.* at 74a-96a. The court specifically rejected respondent's substantive and procedural due process claims. *Id.* at 90a-96a.

3. a. A divided panel of the court of appeals reversed. App., *infra*, 1a-73a. As a threshold matter, the court of appeals held that the INS's determination on July 19, 2000, that respondent was releasable under the Cuban Review Plan when a suitable sponsor or placement was found did not render the case moot. App., *infra*, 15a-19a. The court reasoned that, assuming respondent was still awaiting release, his case was not moot because his release was conditioned on his continued good behavior in custody, and "[s]hould the INS decide, in its discretion, to withdraw his parole or should it be unable to find him a suitable placement," respondent would continue to be detained in federal custody and be subject to the procedures he alleged were constitutionally defective. *Id.* at 17a. The court also stated that, if respondent was subsequently released from INS custody, the case may be adjudicated under the exception to the mootness doctrine for controversies that are capable of repetition, yet evading review. *Id.* at 18a-19a. The court reasoned that, because the Cuban Review Plan allows review by the INS of a detainee's status at any time, the INS "may grant parole, withdraw parole approval or revoke [respondent's] parole repeatedly within a time period too short to effect appellate review of a habeas corpus petition," that in those circumstances respondent would be subject to the same detention and hearing procedures he challenges, and that the Commissioner of the INS has the discretion to act within a period too short to

allow future appellate review of another habeas corpus petition. *Id.* at 19a.

The court next held that the governing statute clearly authorizes the Attorney General to detain an excludable alien indefinitely. App., *infra*, 23a. The court explained that respondent's continued detention is governed by former 8 U.S.C. 1226(e) (1994), because respondent was ordered excluded in 1987 and his immigration parole was last revoked on March 24, 1997, both before the April 1, 1997, effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 309(c)(1), 110 Stat. 3009-625. App., *infra*, 20a-21a. Section 1226(e)(1) requires the Attorney General to take an aggravated felon such as respondent into custody upon release from a criminal sentence, pending a determination of excludability. App., *infra*, 21a (also citing 8 U.S.C. 1182(d)(5)(A) (1994) (authorizing the Attorney General to return to custody a previously paroled excludable alien if the Attorney General determines that the purposes of the parole have been served)). Former Sections 1226(e)(2) and (3) prohibit the Attorney General from releasing such an alien unless the Attorney General concludes that the alien cannot be deported because his country of nationality refuses to accept his return, and that the alien would not pose a danger to the safety of other persons or property if released. 8 U.S.C. 1226(e)(2) and (3) (1994). App., *infra*, 21a-22a. Thus, the court agreed with the other circuits that have considered the issue and held that former Section 1226(e) authorizes the Attorney General to retain custody of an excluded alien convicted of an aggravated felony when he determines that the alien cannot be repatriated promptly or released safely into the community. *Ibid.* The court also noted that it could not construe Section 1226(e) to avoid

the question of the constitutionality of respondent's detention. *Id.* at 23a.

Turning to that constitutional question, the court of appeals distinguished this Court's ruling in *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), which sustained the prolonged detention of an excludable alien, because, unlike in *Mezei*, the Nation is "not operating in a declared state of emergency," and there was no suggestion that respondent "poses a threat to our national security." App., *infra*, 32a-33a. In the court of appeals' view, indefinite detention of an excludable alien would implicate a Fifth Amendment interest in liberty. *Id.* at 33a-34a. The court then concluded that, although respondent's continued detention was rationally related to the government's nonpunitive interest in protecting society, the detention would be unconstitutionally excessive if it were indefinite. *Id.* at 37a-40a.

The court held that, in order to establish that detention of an alien like respondent is not indefinite, the government must demonstrate "(1) that the alien's home nation and this government are engaged in diplomatic discussions which encompass a specific repatriation agreement whose details are currently being negotiated; and (2) that the alien is among those whose repatriation the agreement contemplates." App., *infra*, 43a. The court further held that the automatic annual review afforded respondent under the Cuban Review Plan did not affect whether his detention was indefinite because the INS has broad discretion whether to grant or revoke parole, so that respondent "can never be certain of receiving such parole." *Id.* at 44a. The court then concluded that in this case, respondent's detention "can only be considered excessive in relation to the purpose of protecting the community from danger and

enforcing an immigration order that is, at present, unenforceable," *ibid.*, and that his detention had therefore "crossed the line from permissive regulatory confinement to impermissible punishment without trial," *id.* at 46a. The court ordered respondent's release within 30 days of the issuance of the court's mandate, following a hearing before the district court, and subject to conditions imposed by that court consistent with the court of appeals' opinion. *Ibid.*

b. District Judge Rice, sitting by designation, dissented. App., *infra*, 47a-73a.[3] Judge Rice explained that he did "not believe that the indefinite detention of an excludable alien such as [respondent] implicates any protected liberty interest in freedom from bodily restraint." *Id.* at 51a. He further stated that, assuming arguendo that a Fifth Amendment right is implicated, he did "not believe that [respondent's] detention, which includes annual review for parole eligibility, is excessive in relation to the government's non-punitive purpose." *Ibid.*

c. The government filed a petition for rehearing and for rehearing en banc on March 16, 2001. In that filing, the government notified the court of appeals that the INS anticipated releasing respondent within the following two weeks and that his release was conditioned on his placement in a halfway house program. See Gov't C.A. Reh'g Pet. 5. As noted above, the INS released respondent on immigration parole for the third time on or about March 22, 2001, to a halfway house in Miami, Florida. The court of appeals denied rehearing on April 16, 2001, with Judge Rice dissenting. App., *infra*, 99a-

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[3] Judge Rice agreed with the court of appeals' rulings regarding jurisdiction, mootness, and the Attorney General's statutory authority to detain respondent. App., *infra*, 49a n.2.

100a. We have been informed by the INS that respondent completed the halfway house program on May 16, 2001.

REASONS FOR GRANTING THE PETITION

The court of appeals correctly held that 8 U.S.C. 1226(e) (1994) expressly authorizes the Attorney General to detain an excludable alien whose country of nationality will not accept his return, unless the Attorney General determines that the alien will not pose a danger to the safety of other persons or of property if released. The court of appeals further held, however, that the Attorney General's detention of respondent pursuant to that express statutory authorization violated respondent's substantive due process rights. The court of appeals thus held an Act of Congress unconstitutional as applied to respondent and other Mariel Cubans and other excludable aliens who are similarly situated. That constitutional holding conflicts with the decisions of other courts of appeals. Certiorari therefore is plainly warranted.

We do not, however, urge the Court to grant plenary review in this case at the present time. Since the court of appeals rendered its decision, this Court announced its decision in *Zadvydas* v. *Davis*, 121 S. Ct. 2491 (2001). The opinion in *Zadvydas* demonstrates that the court of appeals erred in its consideration of the application of the Due Process Clause to the detention of aliens who have been stopped at the Nation's borders, as well as in its attempt to distinguish *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953), which sustained the prolonged detention of such an alien. We therefore suggest that the Court grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to that court for further con-

sideration in light of *Zadvydas*. We also suggest that the Court remand the case as well for further consideration of the question of mootness. Since the court of appeals rendered its decision, respondent not only has been released to a halfway house, but he has now completed the halfway house program and reentered the community under conditions of supervision. It is speculative whether respondent's parole might be revoked again in the future, and even if it were, there is no reason to believe that the question of the constitutionality of his renewed detention following such a revocation would evade review. The court of appeals should be given the opportunity to consider further the issue of mootness, as well as the merits, in light of intervening developments, including this Court's decision in *Zadvydas*.

1. In *Zadvydas*, this Court addressed the legality of the continued detention under 8 U.S.C. 1231(a)(6) (Supp. V 1999) of aliens who "were admitted to the United States but subsequently ordered removed." 121 S. Ct. at 2495. The Court held that, to avoid what the Court considered would be a serious constitutional question, the Attorney General's authority under Section 1231(a)(6) to detain such an alien beyond the statutory removal period must be construed not to authorize indefinite detention, but instead to be limited to detention for a period reasonably necessary to remove the alien. The Court held that, under that standard, detention for a period of six months is presumptively reasonable and that, after such a period, if "the alien provides good reason to believe that there is no significant likelihood of removal in the reasonably foreseeable future, the Government must respond with evidence sufficient to rebut that showing." *Id.* at 2505. The Court remanded the two cases pending before it for

further proceedings consistent with the Court's opinion. *Ibid.*

At the outset of its opinion in *Zadvydas*, the Court emphasized that "[a]liens who have not yet gained initial admission to this country would present a very different question" from that raised by the two cases then before the Court, both of which involved aliens who had been admitted to the United States (and been granted lawful permanent resident status), but were then later ordered removed. 121 S. Ct. at 2495. Moreover, in its analysis of the potential constitutional problem posed by the detention of the two aliens in *Zadvydas*, the Court rejected the United States' reliance on *Mezei*, *supra*, which likewise "involve[d] indefinite detention." 121 S. Ct. at 2500. The Court noted that *Mezei* "differ[ed] from [*Zadvydas*] in a critical respect," because Mezei was seeking entry to the United States and his presence on Ellis Island did not count as an entry. *Ibid.* "Hence, he was 'treated,' for constitutional purposes, 'as if stopped at the border.'" *Ibid.* (quoting *Mezei*, 345 U.S. at 213, 215). In the Court's view, "that made all the difference" from a case involving an alien who had effected an entry to this country. 121 S. Ct. at 2500. The Court explained that the *Mezei* Court's rejection of the alien's challenge to his continued detention "rested upon a basic territorial distinction," because Mezei's presence in detention at Ellis Island "was not 'considered a landing' and did 'not affec[t]' his legal or constitutional status." *Id.* at 2501 (brackets in original) (quoting *Mezei*, 345 U.S. at 215). Thus, the Court made clear that the constitutional doubts it identified with regard to the detention at issue in *Zadvydas* do not apply to the detention of an alien who has not entered the country and is treated for constitutional purposes as if he is at the border. 121 S.

Ct. at 2500. Indeed, the Court pointed out, "[t]he distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law." *Ibid.* (citing cases).

Respondent, like Mezei, is an excludable alien who is properly treated, for constitutional purposes, as if stopped at the border. He was allowed to be physically present in the United States only on immigration parole. See 8 U.S.C. 1182(d)(5)(A) (1994 & Supp. V 1999) (authorizing the Attorney General to parole into the United States an applicant for admission, but specifying that "such parole of such alien shall not be regarded as an admission of the alien"); 8 U.S.C. 1101(a)(13)(B) (Supp. V 1999) (providing that an alien who is paroled under Section 1182(d)(5) "shall not be considered to have been admitted"); *Leng May Ma* v. *Barber*, 357 U.S. 185 (1958). Therefore, respondent falls within the category of aliens whose detention does not raise the constitutional concerns identified in *Zadvydas* and is instead controlled by *Mezei*.[4]

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[4] The court of appeals correctly held that respondent's continued detention is governed (and expressly authorized) by former 8 U.S.C. 1226(e) (1994), because respondent was in exclusion proceedings before the April 1, 1997, effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 309(c)(1), 110 Stat. 3009-625. App., *infra*, 20a-21a.

The detention of aliens who have not entered the United States and who were placed in proceedings after the effective date of IIRIRA is subject to 8 U.S.C. 1231(a)(6) (Supp. V 1999), the statute at issue in *Zadvydas*, rather than to 8 U.S.C. 1226(e) (1994). Even where Section 1231(a)(6) applies, however, the statutory ruling in *Zadvydas* does not control the question of the detention of aliens who have not effected an entry to the United States, because the serious constitutional doubts that informed the Court's decision in that case do not apply to the detention of those aliens,

The constitutional and statutory framework governing the status of aliens such as respondent respects "the political branches' authority to control entry into the United States," and hence avoids an "unprotected spot in the Nation's armor." *Zadvydas*, 121 S. Ct. at 2502 (citation omitted). That framework allows the Attorney General to alleviate the concerns, humanitarian and otherwise, that arise from the detention of aliens when they arrive at the border and throughout the ensuing process of determining whether there is a basis for permitting them to enter and lawfully remain. Those concerns were especially great in the circumstances of respondent and the other Mariel Cubans who arrived among approximately 125,000 undocumented Cubans over the course of a few months. App., *infra*, 11a. Immigration parole allows the Attorney General to grant such aliens relief from the physical restriction of actual detention, without constituting any concession on the part of the United States that they have a right to enter or remain at large in this country.

The court of appeals failed to give effect to those constitutional principles and to the distinction between the liberty interests of such aliens and the interests of aliens who have been admitted to the United States. In particular, the court expressly declined to follow *Mezei*, confining that decision to instances where there is a

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and their continued detention may be appropriate to effectuate the statutory purpose of preventing their entry into and presence in the United States. Moreover, as the court of appeals in this case correctly recognized, the Attorney General's authority to detain an alien (like respondent) who has been stopped at the border also derives from 8 U.S.C. 1182(d)(5)(A) (1994 & Supp. V 1999), which permits the Attorney General to return to custody a previously paroled alien if the Attorney General determines that the purposes of the parole have been served.

"declared state of emergency" or a "threat to our national security." App., *infra*, 33a.

Zadvydas demonstrates that the court of appeals erred in its understanding of *Mezei*'s precedential force. This Court made clear that the fact that the alien in *Mezei* had not entered the country is what "made all the difference." 121 S. Ct. at 2500. There is no suggestion in *Zadvydas* that the holding of *Mezei* is limited to declared states of emergencies or national security threats. To the contrary, the Court emphasized that *Mezei* was "like" *Zadvydas* in that both cases "involve[d] indefinite detention," and that the "critical" difference between the two cases was that Mezei had not effected an entry to the United States while the aliens in *Zadvydas* had. *Ibid.*; see also *id.* at 2501 (quoting *Mezei*, 345 U.S. at 215 (Mezei's presence on Ellis Island "did 'not affec[t]' his legal or constitutional status")).[5]

2. The court of appeals' decision conflicts with the decisions of the eight other courts of appeals that have addressed similar constitutional claims and have all ruled in the government's favor. See *Carrera-Valdez* v. *Perryman*, 211 F.3d 1046 (7th Cir. 2000); *Ho* v. *Greene*, 204 F.3d 1045 (10th Cir. 2000); *Chi Thon Ngo* v. *INS*, 192 F.3d 390 (3d Cir. 1999); *Guzman* v. *Tippy*, 130 F.3d 64 (2d Cir. 1997); *Barrera-Echavarria* v. *Rison*, 44 F.3d 1441 (9th Cir.) (en banc), cert. denied, 516 U.S. 976 (1995); *Garcia-Mir* v. *Meese*, 788 F.2d 1446 (11th Cir.),

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[5] Accord App., *infra*, 61a (Rice, J., dissenting) (explaining that *Mezei*'s finding of no due process violation did not rest on a state of emergency or national security concerns, but rather on the fact that Mezei, as "an alien seeking initial entry, had no constitutional right to enter the United States at all" and, absent such a right, "had no liberty interest in being free from indefinite detention to effect his exclusion").

cert. denied, 479 U.S. 889 (1986); *Gisbert* v. *United States Attorney General*, 988 F.2d 1437, amended, 997 F.2d 1122 (5th Cir. 1993); *Palma* v. *Verdeyen*, 676 F.2d 100 (4th Cir. 1982); see also *Ma* v. *Ashcroft*, 2001 WL 845325 at *9 (9th Cir. July 27, 2001) (reaffirming ruling in *Barrera-Echavarria* regarding excludable aliens as distinguished from aliens who have entered and been admitted to this country). *Zadvydas* confirms the correctness of those constitutional rulings. Indeed, the day after the Court issued its decision in *Zadvydas*, it denied certiorari in a case in which the Fifth Circuit had rejected a Mariel Cuban's constitutional challenge to his prolonged detention. See *Mendivia* v. *United States*, 121 S. Ct. 2590 (2001).

3. Because the court of appeals rendered its decision and denied rehearing prior to this Court's decision in *Zadvydas*—and because its reasoning and result cannot be reconciled with *Zadvydas*'s reading of *Mezei*—the petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded for further consideration in light of *Zadvydas*. *O'Leary* v. *Mack*, 522 U.S. 801 (1997) (vacating and remanding for further consideration in light of intervening Supreme Court precedent); *Kapoor* v. *United States*, 516 U.S. 801 (1995) (same); see also *Henry* v. *City of Rock Hill*, 376 U.S. 776, 776 (1964) (per curiam); *Thomas* v. *American Home Prods., Inc.*, 519 U.S. 913, 915 (1996) (Scalia, J., concurring) (discussing Court's "routine[]" practice of vacating and remanding to allow court of appeals to consider intervening Supreme Court decision); 28 U.S.C. 2106 ("[t]he Supreme Court * * * may * * * vacate * * * any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and

* * * require such further proceedings to be had as may be just under the circumstances").

A remand will also afford the court of appeals the opportunity to reconsider other aspects of its opinion that are contrary to the Court's reasoning in *Zadvydas*. For example, the court of appeals ruled that, in order to establish that detention of an alien like respondent is not indefinite, the government must demonstrate: "(1) that the alien's home nation and this government are engaged in diplomatic discussions which encompass a specific repatriation agreement whose details are currently being negotiated; and (2) that the alien is among those whose repatriation the agreement contemplates." App., *infra*, 42a-43a. In *Zadvydas*, however, this Court made clear that the existence of an "extant or pending" repatriation agreement is not determinative of whether there is a reasonable likelihood that an alien will be removed in the foreseeable future. 121 S. Ct. at 2505 (citation omitted).

Moreover, because of the unique circumstances surrounding respondent's arrival during an influx of approximately 125,000 aliens from Cuba, largely induced by the Castro regime,[6] the courts should be particularly attentive to the Executive Branch's foreign policy concerns and judgments. See *Zadvydas*, 121 S. Ct. at 2504. Indeed, the Court recognized in *Zadvydas* that, even in the context of aliens who have entered the country, there may be instances involving "special circumstances where special arguments might be made for forms of

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[6] Cuban officials included numerous hardened criminals in the group of people sent to the United States. 52 Fed. Reg. 48,799 (1987); see also *Carrera-Valdez* v. *Perryman*, 211 F.3d 1046, 1047 (7th Cir. 2000); *Palma* v. *Verdeyen*, 676 F.2d 100, 101 (4th Cir. 1982).

preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security." *Id.* at 2502. Here, of course, the Executive's judgment of how best to handle the unique situation presented by the huge influx of Mariel Cubans led the Executive to afford generous grants of immigration parole to aliens like respondent who were clearly inadmissible and to establish a process for automatic administrative review of the status of any such aliens who are detained, including those who are re-detained because they have abused the conditions of that parole through repeated violations of this country's criminal laws. That process has resulted in respondent's rerelease on parole on two occasions.

4. We also suggest that the Court remand the case as well for further consideration of the question of mootness. In his habeas corpus petition, respondent requested relief in the form of his immediate release from physical custody or an emergency hearing.

At the time the court of appeals rendered its decision, respondent was still in detention. See, App., *infra*, 16a, 17a. When the government filed its petition for rehearing, respondent was scheduled to be released to a halfway house in approximately two weeks but had not yet been released. See p. 13, *supra*. We have been informed by the INS that subsequent to the court of appeals' denial of rehearing, respondent completed the halfway house program, and that he has reentered the community subject only to standard conditions of release. Thus, it is even more true now that respondent has no current stake in the litigation. See *Picrin-Peron* v. *Rison*, 930 F.2d 773, 775-776 (9th Cir. 1991) (holding that case became moot upon habeas petitioner's release from immigration custody and reparole into the United States).

In addition to holding that the case was not moot because respondent was still in custody at the time it ruled, see Pet. App. 16a-17a, the court of appeals also stated that should respondent thereafter be released, the case may also be adjudicated under the exception under the mootness doctrine for controversies that are capable of repetition yet evading review. See *id.* at 18a-19a. Because the court had already ruled that the case was not moot at the time it rendered its decision (because respondent was still in custody), the question whether this case would fall into the exception to mootness for controversies that are capable of repetition yet evading review if respondent was thereafter released from custody was not actually presented, and the court's discussion of that issue was not necessary to its conclusion that it had jurisdiction.

The court's belief that that exception would apply if respondent was later released was also incorrect. Whether respondent's parole will be revoked at some time in the future is entirely speculative, because that eventuality would almost surely depend on whether he once again engaged in criminal activity or otherwise violated the conditions of his release. See 8 C.F.R. 212.2(h)(2). That possibility is uniquely within respondent's control, and does not furnish a basis for finding a continuing Article III controversy. See *Spencer* v. *Kemna*, 523 U.S. 1, 15-16, 17-18 (1998); *Los Angeles* v. *Lyons*, 461 U.S. 95, 102-103 (1983); *O'Shea* v. *Littleton*, 414 U.S. 488, 497 (1974). Even if respondent's release were revoked again at some time in the future, there is no reason to believe that issues concerning the constitutionality of his detention would evade review. As explained above (see pp. 19-20, *supra*), a number of other courts of appeals have adjudicated the consti-

tutionality of the detention of Mariel Cubans, with no evident mootness difficulties.

Furthermore, *Zadvydas* makes it clear that, even where (unlike here) there are serious constitutional questions concerning the indefinite detention of an alien whose country of nationality will not accept his return, the alien may be released on supervision "under release conditions that may not be violated," 121 S. Ct. at 2502, and "the alien may no doubt be returned to custody upon a violation of those conditions," *id.* at 2504. Accordingly, any constitutional claim respondent might have would arise only from a period of continued detention *following* any future revocation of his parole. The Court addressed a mootness argument in similar circumstances in *Spencer* v. *Kemna*, *supra*, which held that the exception from mootness for controversies that are capable of repetition yet evading review did not apply in the case of a habeas petitioner's challenge to an order revoking his criminal parole once his criminal sentence expired. The Court explained that the petitioner had "not shown (and we doubt that he could) that the time between parole revocation and expiration of sentence is always so short as to evade review." *Id.* at 18. Likewise here, there is no basis for concluding that when a Mariel Cuban's parole is revoked, the alien will always be rereleased in a time that is so short that the constitutionality of his detention will evade review.

For the foregoing reasons, we suggest that, in addition to remanding this case for further consideration of the merits of respondent's constitutional challenge to his detention in light of *Zadvydas*, the Court should remand for further consideration of the question of mootness, now that respondent has been released from INS custody and the question of the actual applicability of the exception to mootness for controversies that are

capable of repetition yet evading review is concretely presented—and now that *Zadvydas* makes clear that an alien whose country will not accept his return may be returned to custody if he violates the conditions of his release.

CONCLUSION

The Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to the court of appeals for further consideration of the question of mootness and for further consideration of the merits in light of *Zadvydas* v. *Davis*, 121 S. Ct. 2491 (2001).

Respectfully submitted.

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AUGUST 2001

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-5683

MARIO ROSALES-GARCIA, PETITIONER-APPELLANT

v.

J.T. HOLLAND, WARDEN, RESPONDENT-APPELLEE

Submitted: Aug. 4, 2000
Decided and Filed: Jan. 31, 2001

Before: MOORE and CLAY, Circuit Judges; RICE, District Judge.*

MOORE, J., delivered the opinion of the court, in which CLAY, J., joined. RICE, D.J. (pp. 727-39), delivered a separate dissenting opinion.

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* The Honorable Walter Herbert Rice, Chief United States District Judge for the Southern District of Ohio, sitting by designation.

OPINION

MOORE, Circuit Judge.

This case presents the difficult and complex question whether an excludable alien has a liberty interest recognized by the Fifth Amendment's Due Process Clause when the Immigration and Naturalization Service ("INS") seeks to detain him in custody, perhaps indefinitely, without charging him with a crime or affording him a trial but simply on the ground that it cannot effect his deportation. On July 9, 1998, Petitioner-Appellant Mario Rosales-Garcia ("Rosales") applied for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the Eastern District of Kentucky. He sought relief from the Attorney General's decision on March 24, 1997 denying him parole from his detention at the Federal Medical Center in Lexington, Kentucky, or in the alternative, an emergency hearing before the Cuban Review Panel and the INS. Rosales is a Cuban citizen who arrived in this country during the Mariel boatlift in 1980. Because he has been declared excludable by the INS he would ordinarily be deported to his home country; however, the United States is unable to effect his deportation because Cuba refuses to accept his return. Thus, Rosales, after completing a federal prison sentence, has been taken into INS custody pending an agency determination that he is eligible for parole or that Cuba will allow him to enter. Rosales, appearing *pro se*, asserts that both his substantive and procedural due process rights under the Constitution are being violated by the Attorney General and the INS. The district court dismissed his petition with prejudice, and Rosales promptly appealed to this court. We **REVERSE** the

district court's judgment, order Rosales's release, and **REMAND** to the district court for proceedings in accordance with this opinion.

I. Background

A. Facts and Procedure

Rosales left Cuba, his birthplace, and arrived in this country around May 6, 1980 as part of the Mariel boatlift, so known because over 120,000 undocumented Cubans departed from the Mariel Harbor en route to the United States. Although Rosales was initially detained by immigration authorities, he was released into the custody of his aunt on May 20, 1980, pursuant to the Attorney General's authority to parole illegal aliens for humanitarian or other reasons under 8 U.S.C. § 1182(d)(5)(A) (1994).[1] J.A. at 97-110 (Request for Asylum, Passport). Rosales was subsequently arrested multiple times[2] and was convicted of several of the

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[1] The statute read in pertinent part: "The Attorney General may . . . in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States." 8 U.S.C. § 1182(d)(5)(A) (1994) (amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") § 602(a), Pub. L. 104-208, 110 Stat. 3009 (1996)).

[2] Rosales was first arrested in 1980 for aggravated battery. That charge was dismissed. J.A. at 145. He was arrested for other offenses, including possession of marijuana, burglary, and loitering,

offenses including: possession of marijuana and resisting arrest in October 1981, J.A. at 146-47; grand theft in September 1981, for which he received two years' probation in March 1983, J.A. at 174; burglary and grand larceny in October 1983, for which he received two six-month sentences to be served concurrently, J.A. at 152-53, 175; and escape from a penal institution in February 1984, J.A. at 177, where he had been serving time for his previous convictions. On January 9, 1986, Rosales received a sentence of 366 days for the escape charge after he pleaded guilty. J.A. at 155, 181.

Rosales's immigration parole was revoked on July 10, 1986 by the INS, pursuant to its authority under 8 U.S.C. § 1185(d)(5)(A) and 8 C.F.R. § 212.5(d)(2), for the escape and grand larceny charges. J.A. at 111-13. In a separate proceeding before an immigration judge in Atlanta, Georgia, on June 26, 1987, Rosales was denied asylum and deemed excludable[3] from this

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but apparently he was not convicted of those offenses. J.A. at 147-54.

[3] Before the enactment of IIRIRA, aliens ineligible for admission into the United States were designated "excludable" aliens. *See* 8 U.S.C. § 1182(a) (1994). Excludable aliens who were granted "parole" by the Attorney General could then enter the country. If an excludable alien's parole was revoked, exclusion proceedings would be brought to deport him. *See* 8 U.S.C. § 1182(d)(5)(A) (1994). These aliens are now referred to as "inadmissible" aliens. *See* 8 U.S.C. § 1182(a). Aliens who had gained admission into the United States but were here illegally were designated "deportable" aliens. *See* 8 U.S.C. § 1251 (1994). They could be removed from this country by deportation proceedings. *See* 8 U.S.C. § 1252 (1994). Proceedings to remove both inadmissible and deportable aliens are now referred to as "removal" proceedings. *See* 8 U.S.C. § 1229a. Inadmissible aliens are removable

country because he lacked a visa or other documentation entitling him to admission and because he had been convicted of state crimes in Florida. J.A. at 115. Rosales remained in immigration custody until he was considered for immigration parole a second time on April 5, 1988. J.A. at 120. He was released on May 20, 1988 to the custody of his uncle in Miami. J.A. at 122-25. Rosales was not deported at that time, however, because Cuba refused to take him back.

On March 18, 1993, Rosales pleaded guilty to one count of conspiracy to possess with the intent to distribute cocaine in the United States District Court for the Eastern District of Wisconsin; he was sentenced to 63 months in federal prison, followed by five years of supervised release. J.A. at 159-61. While Rosales was serving his sentence, the INS lodged a detainer against him, directing prison officials to release him to INS custody for deportation proceedings at the completion of his sentence. J.A. at 126-27. On March 24, 1997, prior to his release, Rosales's immigration parole was again revoked pursuant to the regulations governing parole of Mariel Cubans at 8 C.F.R. § 212.12 (the "Cuban Review Plan").[4] *See* 8 C.F.R. § 212.12(a).

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under 8 U.S.C. § 1227(a)(1)(A). Under the prior statutory scheme, Rosales was an "excludable" alien.

[4] Because of the lack of an agreement with Cuba for the return of Mariel Cubans, the Attorney General adopted the Cuban Review Plan, at 8 C.F.R. §§ 212.12-.13, in 1987 to govern the grant and revocation of parole to all Cubans who arrived in the United States between April 15, 1980 and October 20, 1980. Under the Plan, the authority to grant parole for detained Mariel Cubans rests with the INS Commissioner, who may act through an Associate Commissioner for Enforcement. *See id.* § 212.12(b)(1). The Associate Commissioner must appoint a Review Plan Director who designates two- or three-person panels (the "Cuban Review

When Rosales was released from prison on May 18, 1997, the INS promptly detained him and took him into custody, pursuant to its authority under 8 U.S.C. § 1226(e) (1994).[5] On November 5, 1997, the Associate Commissioner for Enforcement for the INS reconsidered and then denied Rosales immigration parole. J.A. at 133. The INS rendered its decision on December 12, 1997 and served it on Rosales on February 11, 1998. According to its report, the Cuban Review Panel determined that Rosales had demonstrated "a propensity to

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Panel") to make parole recommendations to the Associate Commissioner. The regulations provide for the annual review of a detainee's status. *See id.* at § 212.12(g)(2). Before making a recommendation that a detainee be granted parole, the Cuban Review Panel members "must conclude that: [1] The detainee is presently a nonviolent person; [2] The detainee is likely to remain nonviolent; [3] The detainee is not likely to pose a threat to the community following his release; and [4] The detainee is not likely to violate the conditions of his parole." *Id.* § 212.12(d)(2).

Each panel must weigh the following factors when making its decisions: "[1] The nature and number of disciplinary infractions or incident reports received while in custody; [2] The detainee's past history of criminal behavior; [3] Any psychiatric and psychological reports pertaining to the detainee's mental health; [4] Institutional progress relating to participation in work, educational and vocational programs; [5] His ties to the United States, such as the number of close relatives residing lawfully here; [6] The likelihood that he may abscond, such as from any sponsorship program; and [7] Any other information which is probative of whether the detainee is likely to . . . engage in future acts of violence, . . . future criminal activity, or is likely to violate the conditions of his parole." *See id.* § 212.12(d)(3).

[5] The statute provided, in pertinent part, that "the Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien" from criminal confinement. 8 U.S.C. § 1226(e) (1994). The parties do not dispute that Rosales's conviction for conspiracy to possess with intent to distribute cocaine was an "aggravated felony" under the statute.

engage in recidivist criminal behavior" as reflected by his criminal record and that his responses to questions at his parole interview were "non-credible." J.A. at 133. The Panel stated that "it is not clearly evident" that releasing Rosales on parole was in the public interest; that he would not pose a threat to the community; or that he would not violate the conditions of immigration parole.[6] J.A. at 133. Rosales has remained in custody since that determination, where he continues to receive periodic consideration for parole under the Cuban Review Plan.[7] *See* 8 C.F.R. § 212.12(g)(2).

Rosales filed his habeas petition with the district court on July 9, 1998. J.A. at 5. In his petition, Rosales asserted that his due process rights under the Fifth and Fourteenth Amendments were violated because he was denied his right to be represented by counsel at the Cuban Review Panel hearing on his parole status; to review the information used against him at that proceeding; and the right to confront and cross-examine witnesses. Rosales also alleged that the Cuban Review Panel improperly assessed his prior convictions when it calculated his "score" in its assessment of his candidacy for parole, in violation of the regulations governing the Review Panel, at 8 C.F.R. §§ 212.12-13. Finally, Rosales asserted that the decision by the INS was an abuse of discretion, arbitrary and capricious, and that it violated Supreme Court precedent. Rosales sought

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[6] The Review Panel worksheet also reveals that Rosales has demonstrated "good conduct" while in custody and that he has participated in English as a Second Language classes, a drug rehabilitation program, industrial training, automotive training, and has received his GED equivalency. J.A. at 137.

[7] As of July 19, 2000, Rosales had been determined to be releasable by the INS pending placement in a suitable halfway house. The effect of this determination is discussed *infra*.

immediate release on parole, or in the alternative, an emergency hearing at which he would be afforded procedural due process rights.

On October 1, 1998, the district court dismissed the habeas petition sua sponte, concluding that "the petitioner is not being held in violation of the U.S. Constitution or any U.S. law, rule or regulation; thus, the petitioner is not entitled to habeas relief." J.A. at 66, 70. Rosales then filed a motion to alter or amend the judgment on October 21, 1998, stating that he meant to assert his due process rights, not under the Constitution, but under 8 U.S.C. §§ 1101, 1105(a) and 5 U.S.C. §§ 551-701 as well as Supreme Court precedents. J.A. at 13. The district court, construing *pro se* petitions leniently, vacated its earlier decision to dismiss and granted Rosales's motion for reconsideration on December 1, 1998, allowing the case to proceed. J.A. at 71-73.

The government filed a response to Rosales's petition on February 4, 1999, arguing that this case is identical to those that have been rejected by other circuits, including the Sixth Circuit in an unpublished opinion, *Gonzalez v. Luttrell*, No. 96-5098, 1996 WL 627717 (6th Cir. Oct. 29, 1996). The government noted that Rosales had received all the procedure due under the Cuban Review Plan and that his parole had been appropriately denied by the Attorney General. Rosales responded to the government by again asserting his right to be free from indefinite detention and to be afforded procedural due process rights at his parole hearings. J.A. at 58-65. Rosales also sought the appointment of counsel through a motion to the district court, but that request was denied on February 23, 1999. J.A. at 75.

The district court dismissed Rosales's amended petition with prejudice on May 3, 1999. The district court, addressing Rosales's statutory claims first, concluded that Congress had granted total discretionary authority to the Attorney General over immigration matters at 8 U.S.C. §§ 1103(a)(1)[8] and 1182(d)(5)(A). After surveying the recent amendments to the immigration laws and noting Congress's intent to provide the Attorney General with more discretion to detain aliens, the district court concluded that "the Attorney General may continue to detain the instant petitioner in conformity with federal law." J.A. at 88-89 (D.Ct.Op.)

The district court also concluded that Rosales had failed to state a cognizable constitutional claim. The court determined that the Sixth Amendment is not applicable to Rosales's petition "because 'immigration proceedings and detention do not constitute criminal proceedings or punishment.'" J.A. at 89 (internal citations omitted). The court next found that the Fifth Amendment does not "provide excludable aliens with procedural due process rights with regard to admission or parole." J.A. at 89. Thus, the court concluded that Rosales was not due any of the procedures which he sought, namely the right to counsel, to review the information used against him, or to confront and cross-examine people who provided information at his parole

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[8] This statute provides that "[t]he Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however,* That determination and ruling by the Attorney General with respect to all questions of law shall be controlling." 8 U.S.C. § 1103(a)(1).

hearing. Although the district court noted that "the law is less clear about the extent to which any substantive due process rights are enjoyed by excludable aliens," the court denied Rosales the benefit of the protection of the substantive component of the Fifth Amendment as well. J.A. at 90. The district court observed that Rosales "has no fundamental right to be free to roam the United States and a fundamental right is the first component of a substantive due process claim." J.A. at 91. The court also found that Rosales's continued detention was "neither arbitrary, conscience-shocking nor oppressive in the constitutional sense." J.A. at 91. Rosales then filed a prompt notice of appeal to this court. J.A. at 95.

In his four-page *pro se* brief to this court, Rosales does not challenge the Attorney General's right to exclude him. Rather, Rosales argues that he should be granted procedural due process rights during his parole revocation hearing and that his substantive due process rights are being violated by the indefinite nature of his detention. In response to the district court's assertion that an excludable alien is not free to "roam" this country, Rosales asserts that he "is not asking for permission to 'roam' the United States." Instead, he claims that he would return to Cuba and that "[i]f he was not part of this 'Catch 22', where he is not allowed to return to his country, he [would] gladly do so." Appellant's Br. at 3.

B. Relations With Cuba

A brief background on the United States' relationship with Cuba is essential to our analysis. Most of the 125,000 Cuban refugees who came to this country in 1980 in the Mariel boatlift were found excludable because they arrived here without proper entry documents or because they had committed crimes in Cuba. However, a large percentage of these Cubans, including Rosales, were paroled, pursuant to the Attorney General's authority under 8 U.S.C. § 1182(d)(5). According to the affidavit of Michael E. Ranneberger, the Coordinator of the Office of Cuban Affairs in the State Department, who has been responsible for negotiations with Cuba since 1995, "[f]or almost two decades, the United States has been discussing with Cuban authorities the issue of return of excludable Cubans." J.A. at 56. The United States reached a limited agreement with Cuba to repatriate Mariel Cubans in December 1984. Under the terms of this agreement, Cuba consented to the return of 2,746 excludable aliens from the Mariel Boatlift, at the rate of 100 per month, whom the INS was able to identify at the time the agreement was reached. J.A. at 56 (Ranneberger Decl.); 81 (D.Ct.Op.). Rosales was not among those named in the 1984 Agreement because he was not declared excludable until 1987. Cuba suspended the agreement in May 1985, but agreed to reinstate the agreement in November 1987. *See Gisbert v. U.S. Attorney Gen.*, 988 F.2d 1437, 1440 (5th Cir. 1993). As of January 1999, 1400 Cubans had been returned to Cuba. J.A. at 56 (Ranneberger Decl.).

Further talks between the two countries took place on September 9, 1994 and May 2, 1995. J.A. at 57 (Ranneberger Decl.). The September 1994 agreement stated that the United States and Cuba "agreed to con-

tinue to discuss the return of Cuban nationals excludable from the United States." J.A. at 57. Ranneberger noted that discussions between the two countries continued periodically, and while he cannot offer details from these sensitive discussions, he says that he "can confirm that the return of Cuban nationals . . . remains under discussion between the two governments." J.A. at 57.

The United States is currently detaining approximately 1,750 Mariel Cubans in U.S. prison facilities who are neither eligible for parole nor deportable because Cuba will not accept them. *See Chi Thon Ngo v. INS*, 192 F.3d 390, 395 (3d Cir. 1999). According to the government, the United States' position has been and currently is that Cuba is required to take back all of its nationals who are denied admission to the United States. Appellee's Br. at 19.

II. Jurisdiction

The government challenged the district court's jurisdiction to hear Rosales's 28 U.S.C. § 2241 habeas petition based on 8 U.S.C. §§ 1252(g)[9] and 1231(h)[10], as well as § 1226(e)[11] and conflicting case law. The district

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[9] This section provides: "Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this Chapter." 8 U.S.C. § 1252(g).

[10] This section provides: "Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." 8 U.S.C. § 1231(h).

[11] This section provides: "The Attorney General's discretionary judgment regarding the application of this section shall not be

court determined that, in light of this court's decision in *Mansour v. INS*, 123 F.3d 423, 426 (6th Cir. 1997), and the absence of further clarification from this court or the Supreme Court, it had jurisdiction to hear the petition.[12] The government appears to have conceded this court's jurisdiction to hear the instant appeal. Appellee's Br. at 2 (stating that the court of appeals' jurisdiction arises under 28 U.S.C. §§ 1291 and 2253). However, it is our obligation to address the predicate question of our jurisdiction, even when it is not contested, before turning to the merits of these appeals. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 73, 117 S. Ct. 1055, 137 L.Ed.2d 170 (1997).

The Supreme Court's recent decision in *Reno v. American-Arab Anti-Discrimination Committee ("AADC")*, 525 U.S. 471, 119 S. Ct. 936, 142 L.Ed.2d 940 (1999), makes clear that the district court was correct to assert jurisdiction over Rosales's habeas petition; it also establishes the propriety of our jurisdiction to hear Rosales's claim. In *AADC*, the Supreme Court addressed the scope of 8 U.S.C. § 1252(g) and its ostensibly sweeping jurisdiction-stripping language.[13]

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subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole." 8 U.S.C. § 1226(e).

[12] In *Mansour*, this court noted that because habeas relief was available to aliens seeking review of final deportation orders, the statute denying any court's jurisdiction to review those orders was constitutional. However, this court left undecided the scope of habeas review available to such aliens. *See Mansour*, 123 F.3d at 426 n. 3 ("[W]e need not address the scope of review that is available on a petition for a writ of habeas corpus.").

[13] We do not believe that either 8 U.S.C. § 1226(e) or § 1231(h) limits our jurisdiction over this appeal because these newly

Forced to reconcile the incongruity of several provisions of the IIRIRA which simultaneously grant and deny the right of judicial review to certain aliens who were in deportation proceedings before April 1, 1997, the Supreme Court determined that § 1252(g) must have a "narrow[ ]" meaning.[14] *See AADC*, 525 U.S. at 482, 119 S. Ct. 936. Rejecting the idea that § 1252(g) "covers the universe of deportation claims—that it is a sort of 'zipper' clause that says 'no judicial review in deportation cases unless this section provides judicial review,'" the Supreme Court restricted § 1252(g) to three discrete actions that the Attorney General may take: the decision to "*commence* proceedings, *adjudicate* cases, or *execute* removal orders." *Id.* The Court noted that "[t]here are of course many other decisions or actions that may be part of the deportation process. . . ." *Id.*

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enacted provisions under IIRIRA do not govern this case. *See* IIRIRA § 309(c)(1).

[14] IIRIRA provides that the revised rules governing removal proceedings, as well as judicial review of those proceedings, do not apply to aliens who were already in exclusion or deportation proceedings prior to the Act's effective date on April 1, 1997. *See* IIRIRA § 309(c)(1). However, IIRIRA § 306(c)(1) makes § 1252(g) applicable to cases "arising from *all* past, pending, or future exclusion, deportation, or removal proceedings" under the Act. IIRIRA § 306(c)(1) (emphasis added). Section 1252(g) purports to strip courts of their jurisdiction over most actions by the Attorney General relating to immigration actions "[e]xcept as provided in this section." However, according to § 309(c)(1), none of the other provisions in § 1252 apply to cases pending before April 1, 1997. In order to avoid reading § 309(c)(1) into a nullity, the Supreme Court crafted an extremely narrow reading of § 1252(g). *See Mustata v. U.S. Dep't of Justice*, 179 F.3d 1017, 1020 n. 3 (6th Cir. 1999) (explaining the conflict between the provisions in greater depth).

In *Zhislin v. Reno*, 195 F.3d 810 (6th Cir.1999), we applied the Supreme Court's reasoning in *AADC* and concluded that § 1252(g) did not preclude our review of an alien's petition for habeas corpus challenging the INS's authority to detain him indefinitely. *See Zhislin*, 195 F.3d at 814. Like Zhislin, Rosales does not seek to review the Attorney General's decision to commence or adjudicate a case, nor does he dispute the removal order entered against him. Instead, Rosales challenges "the right of the Attorney General to detain him indefinitely when it appears that circumstances beyond anyone's control will prevent the deportation order from ever being executed." *Id.* Such a challenge clearly outside the purview of § 1252(g) and we may therefore consider the claim. *See Zhislin*, 195 F.3d at 814; *Carrera-Valdez v. Perryman*, 211 F.3d 1046, 1047 (7th Cir. 2000) (upholding district court's jurisdiction over Mariel Cuban's petition for release from indefinite detention); *Ho v. Greene*, 204 F.3d 1045, 1051 (10th Cir. 2000); *Ma v. Reno*, 208 F.3d 815, 818 n. 3 (9th Cir. 2000), *cert. granted*, — U.S. —, 121 S. Ct. 297, 148 L.Ed.2d 239 (2000); *Chi Thon Ngo v. INS*, 192 F.3d 390, 393 (3d Cir. 1999); *Zadvydas v. Underdown*, 185 F.3d 279, 285-86 (5th Cir. 1999), *cert. granted*, — U.S. ——, 121 S. Ct. 297, 148 L.Ed.2d 239 (2000).

III. Mootness

After this appeal was submitted to this panel, the government informed the panel that on July 19, 2000, the INS determined that Rosales is releasable under the custody review procedures of 8 C.F.R. § 212.12. In its Notice of Releasability, the INS conditioned Rosales's release on efforts to find him a suitable sponsorship or placement, namely a halfway house, as required by the Cuban Review Plan at 8 C.F.R.

§ 212.12(f) ("No detainee may be released on parole until suitable sponsorship or placement has been found for the detainee."). The Notice further stated that Rosales's release from custody is conditioned on his maintaining proper behavior while sponsorship and placement efforts are undertaken and that "[f]ailure to maintain good behavior could result in [ ] continued detention." Because the INS has not provided any further information indicating that such a sponsorship or placement has been found or that Rosales has been released on parole, we must assume that he is still in custody at the Federal Medical Center in Lexington, Kentucky.

The government argues that *Picrin-Peron v. Rison*, 930 F.2d 773, 776 (9th Cir. 1991), stands for the proposition that the INS's notice of releasability moots Rosales's appeal. In *Picrin-Peron*, the Ninth Circuit considered a detainee's appeal from the denial of his habeas corpus petition after the detainee had been released on parole for one year. Pursuant to the court's request, an INS official authored an affidavit for the court declaring that "absent Picrin's reinvolvement with the criminal justice system, a change in the Cuban government enabling him to return to Cuba, or the willingness of a third country to accept him, he will be paroled for another year." *Picrin-Peron*, 930 F.2d at 776. Based on this sworn statement, the Ninth Circuit dismissed Picrin's petition as moot, concluding that the court could offer the detainee no further relief. *See id.*

According to Article III of the Constitution, this court only possesses jurisdiction over actual cases and controversies that will the affect the rights of the litigants. *See McPherson v. Michigan High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (*en*

banc). A case is deemed moot if the relief sought would make no difference to the legal interests of the parties. *See id.* We are obligated to consider whether the "case or controversy" justiciability requirement has been met in this case because it must be satisfied at all stages of review, not just upon initiation of a legal action. *See id.* Rosales's petition seeks either release from custody or a hearing before the Cuban Review Panel with certain procedural protections that he believes were denied to him in error. As a preliminary step in our analysis, we note that Rosales appears to remain in federal custody, as his parole is conditioned on the INS's ability to find him a suitable halfway house as well as on his continued good behavior. We also note that, according to 8 C.F.R. § 212.12(e), "[t]he Associate Commissioner for Enforcement may, in his or her discretion, withdraw approval for parole of any detainee prior to release when, in his or her opinion, the conduct of the detainee, or any other circumstance, indicates that parole would no longer be appropriate." Should the INS decide, in its discretion, to withdraw his parole or should it be unable to find him a suitable placement, Rosales will therefore continue to be detained in federal custody. Thus, this case is not like *Picrin-Peron,* in which petitioner had already been released from detention and the INS verified in a sworn affidavit that he would continue to be granted yearly parole absent his involvement in any criminal activity. Moreover, if Rosales is not released, the same procedures that he asserts are constitutionally defective will continue to be used against him. Based on these circumstances, we conclude that Rosales's petition for relief is not rendered moot by virtue of the fact that he has been notified that he is releasable. This case clearly represents a substantial ongoing controversy between the parties, for which this court can offer relief.

Moreover, we believe that, should Rosales be physically released, this case may also be adjudicated under the well-established exception to the mootness doctrine for controversies capable of repetition yet evading review. *See Grider v. Abramson*, 180 F.3d 739, 746 (6th Cir. 1999); *Pinette v. Capitol Square Review & Advisory Bd.*, 30 F.3d 675, 677 (6th Cir. 1994); *aff'd*, 515 U.S. 753, 115 S. Ct. 2440, 132 L.Ed.2d 650 (1995). Two criteria must be satisfied for a claim to fall under this exception to the mootness doctrine. First, the complaining party must show that the duration of the dispute is too short to be litigated fully prior to the cessation or expiration of the action. Second, the complaining party must show that there is a reasonable expectation that it will be subjected to the same action again. *See Suster v. Marshall*, 149 F.3d 523, 527 (6th Cir. 1998). The Cuban Review Plan confers on the Cuban Review Panel and the Associate Commissioner for Enforcement substantial discretion to withdraw parole approval prior to release and to revoke a detainee's parole once he is out of custody. *See* 8 C.F.R. § 212.12(e), (h).[15] While the Plan provides yearly review for detainees who have been refused parole, *see id.* at § 212.12(g)(2), the Cuban Review Plan Director may schedule a review of the detainee's status "at any time when the Director deems such a review to be warranted." *See id.* at § 212.12(g)(3). Due to the discretionary nature of these regulations, the Associate Com-

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[15] The Associate Commissioner may revoke parole in the exercise of her discretion when "(1) The purposes of parole have been served; (2) The Mariel Cuban violates any condition of parole; (3) It is appropriate to enforce an order of exclusion or to commence proceedings against a Mariel Cuban; or (4) The period of parole has expired without being renewed." 8 C.F.R. § 212.12(h).

missioner for Enforcement or the Cuban Review Panel may grant parole, withdraw parole approval or revoke Rosales's parole repeatedly within a time period too short to effect appellate review of a habeas corpus petition. We have every reason to believe that future review of another habeas petition filed by Rosales will take at least as long as the instant case in arriving at this court. Moreover, should the INS and its officials engage in repeated denials, revocations or withdrawals of parole, the regulations make clear that Rosales will face the same detention and hearing procedures that he challenges in his current petition. Because Rosales's situation is capable of repetition yet evading review, we conclude that his appeal is not moot.

IV. Standard of Review

This court reviews a district court's dismissal of a habeas corpus petition *de novo*. *See Rogers v. Howes*, 144 F.3d 990, 992 (6th Cir. 1998).

V. Analysis

This circuit has not ruled definitely on the constitutionality of indefinite detention of excludable aliens.[16]

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[16] This court has authored several unpublished decisions including *Betancourt v. Chandler*, No. 99-5797, 2000 WL 1359634, at *2 (6th Cir. Sept. 14, 2000) (rejecting claim that Attorney General lacks authority to detain excludable alien indefinitely); *Laetividad v. INS*, No. 99-5245, 1999 WL 1282432, at * 1 (6th Cir. Dec. 27, 1999); *Fernandez-Santana v. Chandler*, No. 98-6453, 1999 WL 1281781, at *1 (6th Cir. Dec. 27, 1999); and *Gonzalez v. Luttrell*, No. 96-5098, 1996 WL 627717, at *1 (6th Cir. Oct. 29, 1996), that affirm the district court's dismissal or denial of an excludable alien's habeas corpus petition. However, because these cases are unpublished, they are not binding on this court. *See* 6th

In its brief to this court, the government frames the question before us as whether Rosales has a protected statutory or constitutional entitlement to immigration parole. The larger question, however, is whether the executive branch of the government has the authority under the United States Constitution to detain a person indefinitely without charging him with a crime or affording him a trial. We hold that indefinite detention of Mario Rosales-Garcia cannot be justified by reference to the government's plenary power over immigration matters and that it violates Rosales's substantive due process rights under the Due Process Clause of the Fifth Amendment to the Constitution.

A. Statutory Authority to Detain Indefinitely

Our first point of analysis is Rosales's statutory claim that the Attorney General and the INS violated their governing statutes and regulations by denying him parole and detaining him indefinitely. *See Reno v. Flores*, 507 U.S. 292, 300, 113 S. Ct. 1439, 123 L.Ed.2d 1 (1993) (noting reviewing court's obligation to construe statutes to avoid constitutional problems unless such construction is plainly contrary to Congress's intent). The government argues that we are bound by former 8 U.S.C. § 1226(e) (1994), which, according to the government, authorizes the Attorney General to continue to detain Rosales indefinitely. According to IIRIRA, its permanent provisions apply only to removal proceedings commenced after April 1, 1997, IIRIRA's effective date. *See* IIRIRA § 309(c)(1). We agree with the government that we must apply former § 1226(e) to the instant case because Rosales was declared exclud-

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Cir. R. 28(g); *Salamalekis v. Comm'r of Soc. Sec.*, 221 F.3d 828, 833 (6th Cir. 2000) (unpublished decisions are not binding precedent).

able in 1987 and his immigration parole was last revoked on March 24, 1997, prior to the Act's effective date.[17] *Cf. INS v. Aguirre-Aguirre*, 526 U.S. 415, 424, 119 S. Ct. 1439, 143 L.Ed.2d 590 (1999) (counseling that courts of appeals must apply *Chevron* deference to agency's interpretations of immigration statute).

According to former § 1226(e), pending a determination of excludability, the Attorney General must take into custody any alien convicted of an aggravated felony[18] upon release of the alien. *See* § 1226(e)(1) (1994); *see also* 8 U.S.C. § 1182(d)(5)(A) (1994) (giving the Attorney General the right to return into custody an excludable alien when "the purposes of such parole shall . . . have been served"); § 1227(a) (1994) (authorizing Attorney General immediately to deport any alien who is excludable unless she decides, in her discretion, "that immediate deportation is not practicable or proper"). Under the former statute, the Attorney General may not release the alien from custody unless she determines that the alien may not be deported because the alien's home country denies or unduly delays acceptance of the alien's return. *See* § 1226(e)(2) (incorporating 8 U.S.C. § 1253(g) (1994)). If this determination is made, the Attorney General may release the alien only after a review in which the severity of the felony committed by the alien is considered and the review concludes that the alien will not pose a danger to the safety of other persons or to property. *See* § 1226(e)(3). Many circuits, including the Second, Third,

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[17] 8 U.S.C. § 1226 (1994) was repealed and reenacted by Congress in IIRIRA § 303 (codified at 8 U.S.C. § 1226). The amended version of the statute is inapplicable to this case.

[18] *See* 8 U.S.C. § 1101(a)(43) (1994) (defining aggravated felonies).

Fifth, Seventh, Ninth, and Tenth Circuits have found former § 1226(e) to authorize the Attorney General to detain indefinitely an excludable alien who has been convicted of an aggravated offense. *See Ho v. Greene*, 204 F.3d 1045, 1055 (10th Cir. 2000) (Attorney General has authority to continue indefinitely to detain excludable alien whose deportation cannot be accomplished expeditiously because the "statute is framed not as a grant of authority to detain the alien, but as a limitation on the Attorney General's power to release the alien from detention"); *Carrera-Valdez v. Perryman*, 211 F.3d 1046, 1048 (7th Cir. 2000); *Chi Thon Ngo v. INS*, 192 F.3d 390, 394 (3d Cir. 1999) (statute permits prolonged detention of excludable aggravated felons); *Gisbert v. U.S. Attorney Gen.*, 988 F.2d 1437, 1446 (5th Cir 1993) ("[W]e do not regard section 1226(e) as a limitation on the Attorney General's authority to detain excludable aliens, either before or after final determination of excludability, pending their removal from this country."); *Alvarez-Mendez v. Stock*, 941 F.2d 956, 962 (9th Cir. 1991) ("The only logical interpretation of section 1226(e) is that it . . . provides that where deportation of an alien found excludable cannot be immediate, the Attorney General may release [the alien] only if doing so will not endanger society.").

Former § 1226(e) is not ambiguous concerning the Attorney General's discretion to detain indefinitely an excludable alien whose deportation cannot be expeditiously accomplished. The statute explicitly states that the Attorney General "shall" not release an alien from custody unless she determines that the alien will not pose a danger to the safety of other persons or to property. The statute does not contain any language limiting the length of time the Attorney General may detain an alien pending a determination that the alien no

longer poses a threat to society. Nor does the statute carve an exception to this language for aliens whose home countries refuse to accept their return. We therefore conclude, in accordance with the other circuits that have analyzed this issue, that the statute clearly authorizes the Attorney General to detain an excludable alien indefinitely. Because we cannot construe the statute to avoid constitutional inquiry, we must now address the constitutionality of Rosales's detention.

B. The Immigration Statute and the Plenary Power Doctrine

In this case, we are confronted with two principles deeply embedded in our jurisprudence that conflict with each other: the political branches' almost complete authority over immigration matters and a person's inalienable right to liberty absent charges or conviction of a crime. Rosales's petition for habeas corpus relief does not contest the government's almost complete control over matters of immigration policy. Under Art. I, § 8, cl. 4 of the Constitution[19] and the plenary power doctrine,[20] the executive and legislative branches have

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[19] The Constitution imbues the legislature with the power to "establish an uniform Rule of Naturalization." U.S. CONST. Art. I, § 8, cl. 4.

[20] The plenary power doctrine, articulated in *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89, 72 S. Ct. 512, 96 L.Ed. 586 (1952), states that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *See also Zadvydas*, 185 F.3d at 289 ("The power of the national government to act in the immigration sphere is thus essentially plenary.").

coordinate authority to establish and enforce policies for admission to and exclusion from this country, while the judiciary accords those branches almost total deference. *See Mathews v. Diaz*, 426 U.S. 67, 81, 96 S. Ct. 1883, 48 L.Ed.2d 478 (1976) ("[T]he responsibility for regulating the relationship between the United States and our alien visitors has been committed to the political branches of the Federal Government"); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542, 70 S. Ct. 309, 94 L.Ed. 317 (1950) (authority over immigration matters stems not just from legislative power "but is inherent in the executive power to control the foreign affairs of the nation."); *Fong Yue Ting v. United States*, 149 U.S. 698, 711, 13 S. Ct. 1016, 37 L.Ed. 905 (1893) (it is the "right to exclude or to expel all aliens, or any class of aliens, absolutely or upon certain conditions, in war or in peace, being an inherent and inalienable right of every sovereign and independent nation, essential to its safety, its independence, and its welfare. . . ."). Under this doctrine, the Attorney General is charged with the administration and enforcement of all laws relating to the immigration and naturalization of aliens, and she does so with virtually no interference from the courts.[21] The Supreme Court has "long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210, 73 S. Ct. 625, 97

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[21] *See* 8 U.S.C. §§ 1103, 1182. Section 1103(a)(1) states that the "Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens" and that the "determination and ruling by the Attorney General with respect to all questions of law shall be controlling."

L.Ed. 956 (1953); *see also Diaz*, 426 U.S. at 82, 96 S. Ct. 1883 (noting "narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization").

Nor does Rosales contest the government's right to designate him an excludable alien and attempt to remove him from this country. The principle that there is no constitutional right to enter this country, *see Knauff*, 338 U.S. at 542, 70 S. Ct. 309, is not under review in this case. The Supreme Court has made clear that an attempt to enter this country is considered a request for a privilege rather than an assertion of right, because "the power to admit or exclude aliens is a sovereign prerogative." *See Landon v. Plasencia*, 459 U.S. 21, 32, 103 S. Ct. 321, 74 L. Ed. 2d 21 (1982). According to the Supreme Court, such a privilege can only be exercised according to the procedures established by Congress and implemented by the appropriate executive officials. *See Knauff*, 338 U.S. at 542-44, 70 S. Ct. 309.

Finally, Rosales does not challenge the government's application of the "entry fiction" to his case. Under the former version of the immigration act the government had two mechanisms for returning non-citizens to their country of origin: "exclusion" was the procedure used to refuse an alien entry at the border of this country; "deportation" was the procedure used to remove an alien who has already entered the country but is here illegally. *See Plasencia*, 459 U.S. at 25-26, 103 S. Ct. 321. Although exclusion proceedings usually occurred at the port of entry, the Supreme Court developed what has become known as the "entry fiction" to govern the rights of those aliens who are deemed excludable but who have nonetheless been allowed to enter physically the United States for humanitarian, administrative, or

other reasons, under 8 U.S.C. § 1182(d)(5)(A). Under the entry fiction, an alien deemed to have entered this country illegally is treated as if detained or "excluded" at the border despite his physical presence in the United States. *See Gisbert*, 988 F.2d at 1440 (explaining distinction between excludable and deportable aliens). Excludable aliens have no rights with regard to their entry or exclusion from this country and they are treated differently from those who have "passed through our gates." *Mezei*, 345 U.S. at 212, 73 S. Ct. 625; *but see Plasencia*, 459 U.S. at 32-34, 103 S. Ct. 321 (resident alien detained at border upon return to country is validly subject to exclusion proceeding but may invoke procedural due process protections during proceedings); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 597-600, 73 S. Ct. 472, 97 L. Ed. 576 (1953) (resident alien returning to U.S. after five-month absence is subject to exclusion hearing but is entitled to procedural due process protections). According to the Supreme Court, they are due only the procedures authorized by Congress for their removal proceedings and nothing more. *See Mezei*, 345 U.S. at 212, 73 S. Ct. 625 (citing *Knauff*, 338 U.S. at 544, 70 S. Ct. 309); *compare Zadvydas*, 185 F.3d at 295-97 (extending entry fiction to deportable aliens who have received final order of deportation and stripping them of due process right to be free from indefinite detention) *and Ho*, 204 F.3d at 1059-60 (same) *with Ma*, 208 F.3d at 825-26 n. 23 (rejecting INS's argument that aliens ordered deportable are on same constitutional footing as excludable aliens seeking entry).

Rosales does, however, challenge the government's authority to detain him indefinitely after he has completed his federal prison sentence and has neither been

charged with nor convicted of another crime. It is to this challenge that we now turn our attention.

C. Constitutional Authority to Detain Indefinitely

The Fifth Amendment to the Constitution restricts the government from depriving all persons of the right to life, liberty, or property without due process of law. *See* U.S. CONST. amend. V. The Supreme Court has consistently held that aliens physically present in this country are not wholly without constitutional protection. Indeed, the Supreme Court has accorded aliens a panoply of Fifth, Sixth, and Fourteenth Amendment rights. Should an excludable alien be accused of committing a crime, he would be entitled to the constitutional protections of the Fifth and Sixth Amendments. *See Wong Wing v. United States*, 163 U.S. 228, 238, 16 S. Ct. 977, 41 L. Ed. 140 (1896) ("[I]t must be concluded that all persons within the territory of the United States are entitled to the protection guaranteed by [the fifth and sixth] amendments, and that even aliens shall not be held to answer for a capital or other infamous crime, unless on a presentment or indictment of a grand jury, nor be deprived of life, liberty, or property without due process of law."). Thus, in *Wong Wing v. United States*, the Court struck down a federal statute imposing a maximum of one year of hard labor on a Chinese alien upon a determination of his deportability, finding it a violation of the alien's due process right to be free from punishment without trial. In *Yick Wo v. Hopkins*, another early immigration case, the Supreme Court announced that the Fourteenth Amendment's protections extend to aliens as well:

> The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says:

> "Nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.

Yick Wo v. Hopkins, 118 U.S. 356, 369, 6 S. Ct. 1064, 30 L. Ed. 220 (1886) (finding imprisonment of Chinese immigrants under state statute unconstitutional because it violated Equal Protection Clause of Fourteenth Amendment); *see also Flores*, 507 U.S. at 315-16, 113 S. Ct. 1439 (O'Connor, J., concurring) (emphasizing that juvenile aliens have a constitutionally protected liberty interest, rooted in the Due Process Clause, in freedom from institutional confinement); *Diaz*, 426 U.S. at 77, 96 S. Ct. 1883 (noting that there are millions of aliens in this country and that "[t]he Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these [aliens] from deprivation of life, liberty, or property without due process of law" whether they are here unlawfully or not).

As the Supreme Court has evaluated whether to extend entitlements or rights to aliens in addition to those protected by the Fifth, Sixth, and Fourteenth Amendments, the Court has demonstrated a willingness to draw lines between the rights due to citizens and those due to aliens. *See Diaz*, 426 U.S. at 80, 96 S. Ct. 1883 (noting that "Congress regularly makes rules that would be unacceptable if applied to citizens"). The Court has also expressed its willingness to distinguish among different classifications of aliens. However, it

has never held that aliens are utterly beyond the purview of the Constitution. Thus, in *Diaz*, the Court held that Congress may constitutionally condition an alien's receipt of federal medical insurance benefits (Medicare Part B) on the legality of his entry and the length of his residence in this country. *See Diaz*, 426 U.S. at 82-83, 96 S. Ct. 1883. However, in *Graham v. Richardson*, 403 U.S. 365, 374, 91 S. Ct. 1848, 29 L. Ed. 2d 534 (1971), the Court held that state statutes conditioning welfare benefits on a residency requirement or denying welfare benefits to resident aliens violated the Fourteenth Amendment's Equal Protection Clause. The Supreme Court has also determined that the exclusion of the children of illegal aliens from a public school system pursuant to a state statute violated the Equal Protection Clause of the Fourteenth Amendment. Rejecting the government's argument that illegal aliens are not "persons" within the purview of the Constitution, the Court stated that "[w]hatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler v. Doe*, 457 U.S. 202, 210, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982).

The government, relying on the Supreme Court's decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S. Ct. 625, 97 L. Ed. 956 (1953), asks this court to conclude, despite a long line of Supreme Court decisions extending to aliens basic Fifth, Sixth, and Fourteenth Amendment protections, that excludable aliens have no cognizable Fifth Amendment liberty interest under the Constitution in freedom from inde-

finite incarceration. In *Mezei*, the Supreme Court reviewed the case of an excludable alien who was being detained indefinitely on Ellis Island because this country deemed him a security threat and the alien's home country, as well as other nations, refused to allow him to return.[22] When the case reached the Supreme Court in 1953, Mezei had been detained on Ellis Island for close to two years. Addressing the question whether the potentially indefinite detention of an excludable alien without a hearing violated the Constitution, the Supreme Court observed that "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Mezei*, 345 U.S. at 210, 73 S. Ct. 625. The Court then deferred to the executive's authority to "impose additional restrictions on aliens entering or leaving the United States during periods of international tension and strife." *Id.* Noting the existence of a presidentially-declared state of emergency, the Supreme Court found that the Attorney General's authority to act derived from the Passport Act of 1918, which permitted the executive to "shut out aliens whose 'entry would be prejudicial to the interest of the

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[22] Mezei was born in Gibraltar and lived in the United States from 1923 to 1948. *See Mezei*, 345 U.S. at 208, 73 S. Ct. 625. In 1948, he went to Romania to visit his dying mother. He was denied entry to Romania, and remained in Hungary for 19 months before returning to the United States with a quota immigration visa issued by this country. On February 9, 1950 he was deemed excludable by an immigration officer at Ellis Island on the ground that his entry would prejudice the public interest because he was a security threat.

United States'" during periods of national emergency.[23] *Id.* at 210-11, 73 S. Ct. 625 (citing regulations at 8 C.F.R. § 175.53 promulgated in accordance with the amendments to the Passport Act). The Supreme Court decided that "the times being what they are" it would not question the Attorney General's discretion to detain Mezei at Ellis Island in deference to his assessment that Mezei presented a security threat. *Id.* at 216, 73 S. Ct. 625. Deeming this case "[a]n exclusion proceeding grounded on danger to the national security," *id.*, the Court refused to substitute its judgment for the legislative will. Thus, it found no statutory or constitutional impediment to Mezei's detention or denial of a hearing. *See id.* at 215, 73 S. Ct. 625.

The government would have this court accept the premise that the entry fiction completely forecloses any need for this court to examine whether an excludable alien, faced with the prospect of indefinite detention imposed by an executive agency, possesses a Fifth Amendment interest in liberty from physical constraint. We do not disagree that the entry fiction is an important doctrinal principle that the Supreme Court has employed to uphold this country's immigration laws and regulations, most notably our sovereign right to determine who may enter our borders, and our concomitant policy not to let other nations determine whom we must accept or reject by virtue of their re-

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[23] The Passport Act was amended in 1941 by an act of Congress pursuant to a national emergency declared by the President on May 27, 1941 and which continued in effect in 1953. The amendments to the Act gave the Attorney General authority to exclude aliens whose "entry would be prejudicial to the United States." *See Knauff*, 338 U.S. at 540-41, 70 S. Ct. 309 (citing Act of June 21, 1941, c. 210, 55 Stat. 252, amending § 1 of the Act of May 22, 1918, c. 81, 40 Stat. 559, codified at 22 U.S.C. § 223 (repealed 1952)).

fusal to repatriate their own citizens. However, crucial to our understanding and application of the *Mezei* decision are the circumstances in which the case was decided: the opinion was authored in the midst of the Korean War, as our nation labored under a fear of Communist infiltration[24] and in a state of affairs defined as a national emergency.[25] Courts have always allowed the executive an extraordinary amount of leniency during wartime or when the national security is truly at stake.[26] Such incomparable exigencies are clearly not

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[24] The Supreme Court in *Mezei* specifically noted that Mezei's stateless condition was due to the fact that he "left the United States and remained behind the Iron Curtain for 19 months." *Mezei*, 345 U.S. at 214, 73 S. Ct. 625. In his dissent, Justice Jackson criticized the majority for succumbing to the government's fear of Communist "infiltration." He stated: "[M]y apprehensions about the security of our form of government are about equally aroused by those who refuse to recognize the dangers of Communism and those who will not see danger in anything else." *Id.* at 227, 73 S. Ct. 625 (Jackson, J., dissenting). He concluded by observing that it is "inconceivable" that a "measure of simple justice and fair dealing," namely a "fair hearing with fair notice of the charges," would "menace the security of this country. No one can make me believe that we are that far gone." *Id.* at 228, 73 S. Ct. 625.

[25] Moreover, *Mezei* has been severely criticized for establishing a "preposterous" level of deference to Congress's authorization of due process procedures for aliens. *See Henry Hart, The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1392 (1953).

[26] Indeed, prior to those Supreme Court cases in the 1950s allowing indefinite detention, courts refused to permit the indefinite detention of aliens. As one court held:

> The right to arrest and hold or imprison an alien is nothing but a necessary incident of the right to exclude or deport. There is no power in this court or in any other tribunal in this country to hold indefinitely any sane citizen or alien in imprisonment, except as a punishment for crime. Slavery was abolished by the Thirteenth Amendment. It is elementary that deportation

present in the instant case. We are not operating in a declared state of emergency nor has there been any suggestion to this court that Rosales poses a threat to our national security.

Moreover, while the government argues for absolute judicial deference to its plenary power over immigration policies, it is clear to this court that Congress may not authorize immigration officials to treat excludable aliens with complete impunity. For example, the INS may not, consistent with the Constitution, execute an excludable alien should it be unable to effect his prompt deportation. It is also evident that Congress cannot authorize the infliction of physical torture upon an excludable alien while he is detained in federal prison. *See Gisbert*, 988 F.2d at 1442; *Lynch v. Cannatella*, 810 F.2d 1363, 1374 (5th Cir. 1987) (excludable aliens "are entitled under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials"). Consequently, we emphatically reject the government's premise that excludable aliens are completely foreign to the Fifth Amendment of the Constitution.[27] We therefore find ourselves asked to draw a

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or exclusion proceedings are not punishment for crime. . . . [Petitioner] is entitled to be deported, or to have his freedom.

Bonder v. Johnson, 5 F.2d 238, 239 (D. Mass. 1925); *see also Caranica v. Nagle*, 28 F.2d 955, 957 (9th Cir. 1928) (holding that government must release alien if government fails to execute order of deportation "within a reasonable time").

[27] Other circuits have noted that excludable aliens possess some form of due process rights. *See, e.g., Chi Thon Ngo*, 192 F.3d at 396 ("Even an excludable alien is a 'person' for purposes of the Fifth Amendment and is thus entitled to substantive due process."); *Zadvydas*, 185 F.3d at 294 ("Excludable aliens are persons, entitled to some due process, and other, constitutional protections.");

line of constitutional dimension between the act of torturing an excludable alien and the act of imprisoning such an alien indefinitely. We do not believe that the Constitution authorizes us to draw such a line. While it is true that aliens are not entitled to enjoy all the advantages of citizenship, *see Diaz*, 426 U.S. at 78, 96 S. Ct. 1883, we emphasize that aliens—even excludable aliens—are "persons" entitled to the Constitution's most basic protections and strictures. We conclude that if Rosales is indeed being detained indefinitely, discussed *infra*, his Fifth Amendment interest in liberty is necessarily implicated.

D. Rosales's Fifth Amendment Right to Liberty

The right to be free from bodily restraint, the right at issue in this case, is not a new liberty interest, but is at the heart of those interests protected by the Due Process Clause of the Fifth Amendment and available to all persons within our shores.[28] Rosales asserts that his continuing confinement without trial violates his substantive due process rights under the Fifth Amendment to the Constitution. He also argues that his procedural due process rights have been violated because he was not afforded certain procedural protections during his parole revocation hearing with the Cuban Review Panel. In response, the government urges that

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Lynch, 810 F.2d at 1366 (holding that "even excludable aliens are entitled to the protection of the due process clause while they are physically in the United States").

[28] We note that the Supreme Court decided *Mezei* before deciding a line of cases that expanded upon its conceptions of substantive due process, as well as cases that developed a framework for analyzing whether civil or regulatory confinement rises to the level of criminal "punishment" and thus violates a detainee's substantive due process rights.

"it is undisputed that an alien who has been denied admission to the United States has no liberty interest that would entitle him to be at-large within our borders even temporarily." Appellee's Br. at 25. According to the government, once an alien has been found excludable his detention is a mere continuation of the exclusion that has been authorized by Congress. Because detention serves only to effectuate the exclusion order, there can be no limit on its length, other than a statutory limit, which Congress has not chosen to provide. *See* 8 U.S.C. § 1226(e) (1994).

The Due Process Clause is comprised of two components, one substantive and the other procedural. Substantive due process precludes "the government from engaging in conduct that 'shocks the conscience' or interferes with rights 'implicit in the concept of ordered liberty.'" *See United States v. Salerno*, 481 U.S. 739, 746, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) (citing *Rochin v. California*, 342 U.S. 165, 172, 72 S. Ct. 205, 96 L. Ed. 183 (1952); *Palko v. Connecticut*, 302 U.S. 319, 325-26, 58 S. Ct. 149, 82 L. Ed. 288 (1937)). Indeed, "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992).

We construe Rosales's petition for habeas corpus relief to challenge his detention as impermissible punishment in the absence of a trial. The deprivation of a fundamental liberty interest comports with due process only if it is narrowly tailored to serve a compelling government interest. *See Flores*, 507 U.S. at 302, 113 S. Ct. 1439. According to *Salerno*, in order to determine whether Rosales's detention constitutes

an impermissible restriction on liberty or permissible regulation, this court must analyze whether the detention is imposed for the purpose of punishment or whether it may be considered merely incidental to another legitimate government purpose. *See Salerno*, 481 U.S. at 747, 107 S. Ct. 2095. Unless Congress expressly provides that the purpose of the legislation is punitive, this court must determine whether there is an alternative purpose for the restriction. *See id.* Because the Supreme Court has found that deportation proceedings for resident aliens are civil actions that are not intended as punishment for unlawful entry into this country, we must conclude, for the purposes of this case, that Congress did not intend to punish excludable aliens by detaining them prior to removal from this country. *See AADC*, 525 U.S. at 491, 119 S. Ct. 936 ("While the consequences of deportation may assuredly be grave, they are not imposed as a punishment."); *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039, 104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984) ("The purpose of deportation is not to punish past transgressions but rather to put an end to a continuing violation of the immigration laws."). If the detention is intended as legitimate regulation, as in this case, we must then determine (1) whether there is an alternative, non-punitive purpose which may rationally be assigned to the detention, and (2) whether the detention "appears excessive in relation to the alternative purpose assigned [to it]." *Salerno*, 481 U.S. at 747, 107 S. Ct. 2095 (internal citation omitted).

Bound by this analytical framework, we first consider whether the government has articulated an alternative purpose, other than punishment, that is rationally related to Rosales's detention. The government has identified its interests in detaining Rosales as the need

to protect society from a person who poses a danger to the safety of other persons or to property pursuant to 8 U.S.C. § 1226(e) (1994).[29] As we note *infra*, we do not dispute that Rosales's detention is rationally related to this alternative purpose. Our analysis focuses on the second prong of the *Salerno* test: evaluating whether Rosales's detention appears excessive in relation to the alternative purpose such that it violates his Fifth Amendment interest in liberty. In order to evaluate the question of excessiveness, we must balance the government's stated purpose against the likelihood of Rosales's deportation.

The Due Process Clause clearly does not grant a person an absolute right to be free from detention, even when convicted of no crime. *See Salerno*, 481 U.S. at 748, 107 S. Ct. 2095; *see also Schall v. Martin*, 467 U.S. 253, 281, 104 S. Ct. 2403, 81 L. Ed. 2d 207 (1984) (permitting pretrial detention of juvenile delinquents considered dangerous); *Bell v. Wolfish*, 441 U.S. 520, 535-40, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) (allowing pretrial detention of arrestee if court finds there is risk of flight); *Carlson v. Landon*, 342 U.S. 524, 537-42, 72 S. Ct. 525, 96 L. Ed. 547 (1952) (allowing detention of Communist aliens pending deportation because they posed threat to nation's public interest). In *Salerno*, the Supreme Court upheld the Bail Reform Act against

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[29] Other courts have identified additional purposes for detention including: the government's ability to enforce deportation or exclusion orders; and preventing an alien's flight prior to deportation. *See Hermanowski v. Farquharson*, 39 F. Supp. 2d 148, 159 (D.R.I. 1999); *Phan v. Reno*, 56 F. Supp. 2d 1149, 1155-56 (W.D. Wash. 1999); *Vo v. Greene*, 63 F. Supp. 2d 1278, 1285 (D. Colo. 1999). However, because the government identified only safety to persons and property as its rationale for Rosales's detention, we confine ourselves to evaluating this interest.

a challenge asserting that pretrial detention of prisoners amounted to a deprivation of the prisoners' liberty in violation of the Fifth Amendment. Noting that Congress's stated goal in enacting the Bail Reform Act was to protect the community from dangerous persons likely to commit crime prior to trial, the Court held that "preventing danger to the community is a legitimate regulatory goal" and the Act was rationally related to that goal. *Salerno*, 481 U.S. at 747, 107 S. Ct. 2095; *see also Martin*, 467 U.S. at 264, 104 S. Ct. 2403 ("The 'legitimate and compelling state interest' in protecting the community from crime cannot be doubted."). However, the Court explicitly acknowledged that length of detention could contribute to a finding of excessiveness when it observed that, at some point, "detention in a particular case might become excessively prolonged, and therefore punitive, in relation to Congress' regulatory goal." *See Salerno*, 481 U.S. at 747 n. 4, 107 S. Ct. 2095. In its conclusion that the Bail Reform Act did not cross that point, the Court emphasized that the Act "limits the circumstances under which detention may be sought to the most serious of crimes." *Id.* at 747, 107 S. Ct. 2095. Among the factors contributing to its conclusion, the Court noted that the government must demonstrate probable cause that the arrestee committed the charged crime; the government must prove by clear and convincing evidence that the arrestee presents an identified and articulable threat to an individual or the community; the arrestee is entitled to a prompt detention hearing at which he may be represented by counsel and has the right to testify, present evidence and cross-examine witnesses; and the Speedy Trial Act strictly limits the amount of time an arrestee may be detained prior to trial. *See id.* at 747-51, 107 S. Ct. 2095. Thus, the *Salerno* Court, carefully

delineating the contours of permissible detention, held that a finding of dangerousness alone is not enough to justify civil pretrial detention without assurances that the detention is of finite and limited duration.

Just as the Supreme Court concluded in *Salerno*, we recognize that Rosales's detention is rationally related to the government's non-punitive purpose of protecting public safety. Our concern is whether Rosales's detention, rationally related though it may be to the government's purpose, is unconstitutionally excessive when compared with the indefinite nature of his confinement. Detention to effectuate deportation is arguably analogous to detention prior to criminal trial. Although Rosales has never committed a crime of violence, he has compiled a fairly long and progressively more serious criminal record. The government's interest in detaining Rosales to protect the community from harm is perhaps similar to the government's interest in detaining a violent arrestee prior to trial who presents a safety risk to the community should he be released. As the Supreme Court held in *Salerno*, "the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest." *Salerno*, 481 U.S. at 748, 107 S. Ct. 2095. However, in this case, there are no protections similar to those in *Salerno* for aliens who are detained while the government attempts to effect their deportation. *Cf. Foucha*, 504 U.S. at 82, 112 S. Ct. 1780 (indefinite civil commitment of mentally ill persons is unconstitutional because, unlike in *Salerno*, the detention is not limited in duration); *Martin*, 467 U.S. at 269-70, 104 S. Ct. 2403 (pretrial detention of juveniles is constitutional because it is "strictly limited in time" and juveniles receive an array of procedural protections

during detention such that juvenile may not be detained more than seventeen days). As the government has repeatedly emphasized, there are no limits on the length that the Attorney General may, under 8 U.S.C. § 1226(e) (1994), detain an excludable alien released from prison once the Attorney General concludes that the alien presents a danger to persons or property.

Moreover, we note that in this case, unlike in *Salerno*, Rosales has served his prison sentence for the crime with which he was charged and to which he pleaded guilty. The district court judge set the length of Rosales's sentence pursuant to the United States Sentencing Guidelines, and Rosales paid his debt to society in due course. Should Rosales commit another crime upon his release, there is no reason why he could not be charged, prosecuted, and convicted for that crime. His sentence would undoubtedly reflect his recidivist tendency. *Cf. Foucha*, 504 U.S. at 82, 112 S. Ct. 1780 (noting that society's "normal means of dealing with persistent criminal conduct" is sufficient arsenal against threat that mentally ill person may commit future crime if he is not indefinitely committed). Were Rosales a citizen, he would be entitled to be free once he served his sentence absent any new charges of criminal conduct, even if authorities believed him still to be a dangerous person capable of inflicting future harm on society.

Because Congress has bestowed on the executive the authority to determine whether an alien released from prison still presents a threat to society, however, such an alien may be detained after serving his sentence and prior to his deportation. This court does not dispute Congress's authority to grant the executive that power. However, we note that in one of its earliest immigration

cases, the Supreme Court delineated between detention as a means to ensure deportation and detention as a method of punishment. In *Wong Wing*, the Supreme Court stated that "[w]e think it clear that detention or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens, would be valid." *Wong Wing*, 163 U.S. at 235, 16 S. Ct. 977. Implicit in the Supreme Court's opinion is the idea that the strength of the government's interest in protecting the community and enforcing its immigration laws must be considered in relation to the possibility that the government may actually achieve its goal to effect Rosales's deportation. With this admonition in mind, we turn to an evaluation of the likelihood of Rosales's return to Cuba in order to determine whether his civil detention is excessive in relation to the government's purpose in detaining him.

The government argues that Cuba's unwillingness to accept the return of its citizens does not affect Rosales's statutory or constitutional rights. Appellee's Br. at 18. We disagree. The government submitted an affidavit by Michael Ranneberger, the Coordinator of the Office of Cuban Affairs in the State Department, detailing this country's negotiations with Cuba for the return of Mariel Cubans. Ranneberger's testimony reveals clearly that little progress on repatriation has been made in over fifteen years of talks. Ranneberger could only assert that the issue of repatriating Mariel Cubans "remains under discussion." J.A. at 57. No evidence was presented to this court that any agreement between the two nations was likely or even possible in the near future. Moreover, no evidence was presented that Rosales is among those Mariel Cubans who may be

returned even if such an agreement were to be executed.

Because the government has offered this court no credible proof that there is any possibility that Cuba may accept Rosales's return any time in the foreseeable future, we are constrained to conclude that Rosales faces indefinite detention.[30] While other circuits have found that excludable aliens cannot demonstrate that they are being detained indefinitely because of the possibility that their home country will one day invite them back, *see Zadvydas*, 185 F.3d at 294 (holding that detention is not indefinite until there is a showing that "deportation is impossible, not merely problematical, difficult, and distant"); *Chi Thon Ngo*, 192 F.3d at 398 (concluding that "[i]t is extremely unlikely that the [Vietnamese] petitioner's detention will be permanent" because "[d]iplomatic efforts with Vietnam are underway, albeit at a speed approximating the flow of cold molasses"), we decline to impose such a standard on Rosales. We will not require an alien to demonstrate that there is no conceivable possibility that his home country will ever accept his return in order to prove that his or her detention is indefinite in nature. Due to the vicissitudes of national politics and the potential for change in international relations, no alien could ever surmount such a standard, as the government need only point to ongoing talks, as it has in this case, or the potential for renewed relations to defeat the alien's claim that his home nation has no interest in repatriating him. Instead, this court will require the government to demonstrate (1) that the alien's home nation and this government are engaged in diplomatic dis-

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[30] Rosales has thus far been detained in immigration custody for over three years.

cussions which encompass a specific repatriation agreement whose details are currently being negotiated; and (2) that the alien is among those whose repatriation the agreement contemplates. We believe that, because the government has superior access to information on our diplomatic negotiations with other nations, the burden appropriately rests on the government to demonstrate adequately to this court that there is a genuine likelihood that the alien is among those whom the home country will agree to take back.[31]

Moreover, we conclude that the fact that Rosales receives periodic review of his parole status does not affect the nature of his detention as indefinite. The district court determined that because the Cuban Review Plan calls for yearly consideration of a detainee's status, Rosales cannot characterize his detention as indefinite. J.A. at 92. According to the district court, "[h]is detention is not indefinite but is for only one year at a time; at the end of each year he has an opportunity to plead his case anew." J.A. at 92. Other courts have held similarly. *See Chi Thoñ Ngo*, 192 F.3d at 398 (finding prolonged detention permissible provided the appropriate provisions for parole are available);

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[31] Although the dissent states that excludable aliens "*will not* or cannot go elsewhere," *see infra* p. 47 (emphasis added), we think it important to note that it has never been suggested to this court that Rosales has had the opportunity to be released to any third country. The dissent further states, *see infra* note 17, that "Rosales's habeas petition does not suggest that he or his relatives, who are living in Florida, have arranged for him to leave the United States. Instead, he wants to be released into this country." We seriously question how an alien who is in prison and unrepresented by counsel could ever "arrange" to leave this country, much less whether there is any evidence in the record that any other country will accept Rosales.

Barrera-Echavarria v. Rison, 44 F.3d 1441, 1450 (9th Cir. 1995) (*en banc*) (Mariel Cuban's detention is more like "a series of one-year periods of detention followed by an opportunity to plead his case anew"); *cf. Zadvydas*, 185 F.3d at 291 (noting that because a resident alien has the opportunity to be paroled by showing that he is no longer either a threat to the community or a flight risk, and because his case is reviewed periodically, his detention cannot be considered indefinite). However, as Rosales noted himself in his *pro se* brief to this court, even monthly review of his status would not change the fact that he will not be released until Cuba agrees to accept him, a prospect we have already discounted, or the Cuban Review Panel determines that his behavior comports with its guidelines such that it may offer him parole. As we discussed earlier, because of the broad discretion bestowed upon the INS to grant and revoke parole, Rosales can never be certain of receiving such parole, no matter how well he behaves himself in detention.

Bearing in mind our obligation to weigh the government's stated interest in protecting the community from danger against the likelihood that the government will be able to effectuate Rosales's deportation, we conclude that Rosales's confinement can only be considered excessive in relation to the purpose of protecting the community from danger and enforcing an immigration order that is, at present, unenforceable.[32] We believe

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[32] Several district courts have reached the same constitutional conclusion with regard to deportable aliens. *See Kay v. Reno*, 94 F. Supp. 2d 546, 553 (M.D. Pa. 2000); *Le v. Greene*, 84 F. Supp. 2d 1168, 1175 (D. Colo. 2000); *Vo v. Greene*, 63 F. Supp. 2d 1278, 1285 (D. Colo. 1999); *Tam v. INS*, 14 F. Supp. 2d 1184, 1192 (E.D. Cal. 1998) ("At some point, indefinite detention of a deportable alien

that this case no longer implicates the government's plenary power to control the scope of our nation's immigration laws, namely its ability to enforce final orders of exclusion and deportation. Judicial deference to the political branches' authority over immigration matters has always been premised on the paramount importance of our nation's self-determination and our national prerogative to control who enters our borders and on what conditions. *See Aguirre-Aguirre*, 526 U.S. at 425, 119 S. Ct. 1439 (noting that judicial deference "is especially appropriate in the immigration context where officials exercise especially sensitive political functions that implicate questions of foreign relations") (internal citation omitted). Such deference becomes less compelling, however, when it directly conflicts with other constitutional interests. *Cf. INS v. Chadha*, 462 U.S. 919, 941, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983) ("Congress has plenary authority in all cases in which it has substantive legislative jurisdiction, so long as the exercise of that authority does not offend some other constitutional restriction.") (internal citation omitted). When there is no practical possibility that the alien will be returned home, as in this case, then Rosales's prolonged detention can no longer be considered an ancillary administrative element of the INS's removal procedures and judicial deference loses its rationale altogether. We agree with the Tenth Circuit that when an alien's home country refuses to accept him, it ap-

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caused by an unenforceable INS order must intersect with the Constitution"); *Hermanowski v. Farquharson*, 39 F. Supp. 2d 148, 162 (D.R.I. 1999) (detention for over twenty-eight months with the promise of continued imprisonment for the rest of his life even though alien's country has refused to allow deportation constitutes governmental conduct that "shocks the conscience" in violation of the Fifth Amendment).

pears that "detention is [ ] used as an alternative to exclusion rather than a step in the process of returning petitioner to his native Cuba."[33] *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1386 (10th Cir. 1981); *cf. Chi Thon Ngo*, 192 F.3d at 398 ("It is [ ] unrealistic to believe that these INS detainees are not actually being 'punished' in some sense for their past conduct."). We conclude, therefore, that Rosales's detention has crossed the line from permissive regulatory confinement to impermissible punishment without trial.[34] We order Rosales's release within thirty days of the issuance of the mandate, following a hearing before the district court, upon such conditions as the district court may impose consistent with this opinion.

VI. Conclusion

The district court held that the prospect of indefinitely detaining Rosales was not "arbitrary, conscience-shocking nor oppressive in the constitutional sense." With all due respect, this court must disagree. We

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[33] Although the dissent claims that our reasoning will undermine this nation's ability to enforce its immigration laws by encouraging foreign countries to send their undesirable citizens to our shores, *see infra* p. 736, we believe the dissent's contention is belied by common sense. By virtue of the fact that a nation has cast out certain of its citizens—as in the Mariel boatlift—we can reasonably conclude that such a nation is unlikely to be influenced by the possibility that one day its citizens might be paroled into this country, rather than spending their remaining days locked up in American detention centers.

[34] Because we find that petitioner's substantive due process rights were violated, we do not reach his procedural due process claims.

conclude that the district court improperly denied Rosales's petition for habeas corpus. We therefore **REVERSE** the district court's judgment and **REMAND** for proceedings in accordance with this opinion.

RICE, District Judge, dissenting.

Petitioner Mario Rosales-Garcia ("Rosales"), a citizen of Cuba, is an excludable alien who came to the United States as part of the Mariel boatlift. Since his arrival, Rosales twice has been granted immigration parole by the Immigration and Naturalization Service ("INS")[1] On each occasion, the INS revoked his parole after his conviction on various criminal charges. He is now being detained by the INS, pending an agency determination either (1) that he is eligible for immigration parole once again or (2) that Cuba will accept his return. The majority frames the issue before the court as "whether the executive branch of the government has the authority under the United States Constitution to detain a person indefinitely without charging him with a crime or affording him a trial." With respect to Rosales, the majority answers this question in the negative, concluding that his indefinite detention "cannot be justified by reference to the government's plenary power over immi-

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[1] Immigration parole adopts the fiction that Rosales has never entered this country. *See Vargas v. Swan*, 854 F.2d 1028, 1029 (7th Cir. 1988). Despite his parole and physical presence within the United States, the INS treats Rosales as though he has not been admitted into this country, and, legally, he remains at "the threshold of initial entry." *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 73 S. Ct. 625, 97 L. Ed. 956 (1953). Therefore, he "stands on a different footing" than an alien who has already passed through this nation's gates. *Id.*

gration matters and that it violates [his] substantive due process rights under the Due Process Clause of the Fifth Amendment to the Constitution."

In reaching the foregoing conclusion, the majority does not dispute three key points. *First*, the executive and legislative branches of the government have almost complete control over matters involving immigration and the exclusion of aliens, with virtually no interference from the judiciary. *See, e.g., Mathews v. Diaz*, 426 U.S. 67, 81, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210, 73 S. Ct. 625, 97 L. Ed. 956 (1953). *Second*, the government has the right to designate Rosales an excludable alien and to attempt to remove him. Rosales has no constitutional right to enter this country, and any attempt to do so is a request for a privilege. This privilege must be exercised in accordance with procedures established by Congress and implemented by the executive branch. *See, e.g., United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-544, 70 S. Ct. 309, 94 L. Ed. 317 (1950). *Third*, the "entry fiction" applies to this case. The entry fiction treats an excludable alien "as one standing on the threshold of entry, and therefore not entitled to the constitutional protections provided to those within the territorial jurisdiction of the United States." *Ma v. Reno*, 208 F.3d 815, 823 (9th Cir.), *cert. granted*, — U.S. ——, 121 S. Ct. 297, 148 L. Ed. 2d 239 (2000). The majority acknowledges that, under the entry fiction, individuals such as Rosales are "treated as detained or 'excluded' at the border despite [their] physical presence in the United States." Indeed, the majority notes that such individuals "have no rights with regard to their entry or exclusion from this country and they are treated

differently from those who have 'passed through our gates.'"

After recognizing the foregoing principles, the majority examines the "constitutional authority to detain indefinitely."[2] In so doing, the court properly notes that even excludable aliens are not completely without constitutional protection. Given that aliens have been extended certain Fifth, Sixth and Fourteenth Amendment rights, the majority concludes that *excludable* aliens such as Rosales possess a Fifth Amendment liberty interest in freedom from indefinite detention by the INS. After also recognizing that Congress may not authorize immigration officials to treat excludable aliens with "complete impunity" by executing or torturing them, the majority reasons:

> . . . . We therefore find ourselves asked to draw a line of constitutional dimension between the act of torturing an excludable alien and the act of imprisoning such an alien indefinitely. We do not believe that the Constitution authorizes us to draw such a line. While it is true that aliens are not entitled to enjoy all the advantages of citizenship, *see Diaz*, 426 U.S. at 78, 96 S. Ct. 1883, we emphasize that aliens—even excludable aliens—are "persons"

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[2] Before examining the constitutional issue, the majority resolves several other issues. *First*, the majority concludes that the district court possessed jurisdiction to hear Rosales's claim and that this court has jurisdiction to hear his appeal. *Second*, the majority finds that Rosales's appeal has not been rendered moot by virtue of the INS issuing a Notice of Releasability. *Third*, the majority concludes that the Attorney General and the INS *do* possess the *statutory* authority to detain Rosales indefinitely. I agree with each of these conclusions for the reasons set forth by the majority.

> entitled to the Constitution's most basic protections and strictures. We conclude that if Rosales is indeed being detained indefinitely, [as] discussed *infra*, his Fifth Amendment interest in liberty is necessarily implicated.

After finding that excludable aliens possess a liberty interest in freedom from indefinite bodily restraint, the majority concludes that Rosales's continued detention violates substantive due process. In reaching this conclusion, the majority relies upon the analytical framework set forth in *United States v. Salerno*, 481 U.S. 739, 107 S. Ct. 2095, 95 L.Ed.2d 697 (1987). In *Salerno*, the Supreme Court explained that whether a restriction on liberty (in the form of pretrial detention) violates substantive due process turns upon whether the detention is *punishment* without a trial or whether it is *regulatory* in nature. *Id.* at 746-747, 107 S. Ct. 2095. Absent evidence that Congress intended to punish excludable aliens by detaining them indefinitely,[3] the punitive/regulatory distinction itself turns on (1) whether the detention is rationally related to some alternative (*i.e.*, non-punitive) purpose, and (2) whether the detention appears excessive in relation to the alternative purpose that Congress sought to achieve. *Id.* at 747, 107 S. Ct. 2095.

Applying the foregoing test, the majority notes that the United States has identified as its "alternative purpose" in detaining Rosales "the need to protect society from a person who poses a danger to the safety of other persons or to property. . . ." The court then

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[3] The majority finds no evidence that Congress intended to punish Rosales and other excludable aliens by detaining them indefinitely. I agree with this aspect of the majority's reasoning.

recognizes that Rosales's detention *is* "rationally related" to the government's "alternative" purpose of public safety. Nevertheless, the majority concludes that his indefinite detention is "excessive" in relation to the government's alternative (*i.e.*, non-punitive) purpose, given (1) the probability that he never will return to Cuba and (2) the fact that he "can never be certain of receiving [immigration] parole, no matter how well he behaves himself in detention." As a result, the court concludes that his "detention has crossed the line from permissive regulatory confinement to impermissible punishment without trial. . . ." Consequently, the majority orders his immediate release.

Having reviewed the majority's analysis, I disagree with it in two primary respects. *First*, I do not believe that the indefinite detention of an excludable alien such as Rosales implicates any protected liberty interest in freedom from bodily restraint. *Second*, even assuming, arguendo, that a Fifth Amendment liberty interest is implicated, I do not believe that Rosales's detention, which includes annual review for parole eligibility, is excessive in relation to the government's non-punitive purpose. Consequently, under *Salerno*, his detention is regulatory in nature rather than punitive, and it does not violate substantive due process, even if a protected liberty interest is at stake.

Concerning the first issue, the existence of a liberty interest, I do not dispute that excludable aliens possess *some* Fifth Amendment rights. It is true that neither the Attorney General nor the INS may shoot or torture Rosales without running afoul of his substantive due process rights. *See, e.g., Gisbert v. U.S. Attorney General*, 988 F.2d 1437, 1442 (5th Cir. 1993), *amended* 997 F.2d 1122 (5th Cir. 1993) (recognizing that ex-

cludable aliens have a substantive due process right to be free from "gross physical abuse"). The majority's ruling turns upon its inability to "draw a line of constitutional dimension between the act of torturing an excludable alien and the act of imprisoning such an alien indefinitely." The court concludes that the Constitution does not authorize the judiciary "to draw such a line."

Upon review, however, I cannot agree that drawing a line between torturing an excludable alien and indefinitely detaining him to ensure exclusion from this country violates the Constitution. The government's indefinite detention of an excludable alien simply is not equivalent, for Fifth Amendment purposes, to torturing him or to killing him. It has been generally accepted that "[e]xcluded aliens may be able to challenge, under a constitutional theory, governmental action *outside of the immigration context.*"[4] *Fernandez-Roque v. Smith*, 734 F.2d 576, 582 n. 8 (11th Cir. 1984) (emphasis added) (citing *United States v. Henry*, 604 F.2d 908, 914 (5th Cir. 1979)); *see also Zadvydas v. Underdown*, 185 F.3d 279, 295 (5th Cir.-1999), *cert. granted*, — U.S. ——, 121 S. Ct. 297, 148 L.Ed.2d 239 (2000) (recognizing that excludable aliens may have substantive due process rights, but only with respect to matters that are unrelated to the government's plenary power over immigration). However, this principle does not "limit the government's conduct in the immigration field where it

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[4] *But see Ma*, 208 F.3d at 824 (stating that "it is 'not settled' that excludable aliens have any constitutional rights at all"); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 n. 5, 73 S. Ct. 472, 97 L.Ed. 576 (1953) (quoting *Bridges v. Wixon*, 326 U.S. 135, 161, 65 S. Ct. 1443, 89 L.Ed. 2103 (1945) (Murphy, J., concurring) (" 'The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores.' ")).

possesses plenary authority." *Fernandez-Roque*, 734 F.2d at 582 n. 8 (citing *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (*en banc*), *aff'd* 472 U.S. 846, 105 S. Ct. 2992, 86 L.Ed.2d 664 (1985)). In *Lynch v. Cannatella*, 810 F.2d 1363, 1373 (5th Cir. 1987), the court articulated a clear rationale for drawing "a line of constitutional dimension" between torturing an excludable alien and detaining him indefinitely:

> The basis for limiting the constitutional protection afforded excludable aliens has been the overriding concern that the United States, as a sovereign, maintain[s] its right to self-determination. "As the history of its immigration policy makes clear, this nation has long maintained as a fundamental aspect of its right to self-determination the prerogative to determine whether, and in what numbers, outsiders without any cognizable connection to this society shall be permitted to join it." Courts ordinarily should abstain from placing limits on government discretion in these circumstances because the sovereign interest in self-determination weighs so much more heavily in this scheme than does the alien's interest in entering the country. That interest, however, plays virtually no role in determining whether the Constitution affords any protection to excludable aliens while they are being detained by state officials and awaiting deportation. Counsel has not suggested and we cannot conceive of any national interests that would justify the malicious infliction of cruel treatment on a person in United States territory simply because that person is an excludable alien. We therefore hold that, whatever due process rights excludable aliens may be denied by virtue of their status, they are entitled

> under the due process clauses of the fifth and fourteenth amendments to be free of gross physical abuse at the hands of state or federal officials.

Id. at 1373-74 (footnotes omitted); *see also Gisbert*, 988 F.2d at 1442 ("*Lynch* plainly recognizes that excludable aliens may legally be denied other due process rights, *including* the right to be free of detention.").[5]

In the present case, the government is not endeavoring to deprive Rosales of life or property, nor is it seeking to deprive him of liberty, except to the extent necessary to exclude him from this country, which the majority concedes the INS has an absolute right to do. It is in *this* context that Rosales has no liberty interest protected by the Fifth Amendment.[6] *See Fernandez-*

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[5] In *Gisbert*, the Fifth Circuit expressly rejected the position taken by the majority herein that the indefinite detention of Mariel Cubans constitutes punishment without a trial in violation of their substantive due process rights. *Gisbert*, 988 F.2d at 1441-42.

[6] When engaging in a substantive due process analysis, a court must begin with "a careful description of the asserted right." *Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L.Ed.2d 1 (1993). In the present case, Rosales does not dispute the Attorney General's power to exclude him or to detain him for a reasonable time to effect his return to Cuba. Rather, he claims that, because Cuba refuses to accept him, his detention is indefinite, and possibly permanent, thus constituting punishment without a trial. Rosales contends, and the majority agrees, that he has a liberty interest in being free from this type of detention. If his habeas petition is granted, however, he will be awarded the very right that the government lawfully denied to him as a result of his exclusion, namely the right to be at large in the United States. Although Rosales characterizes his request as one to be released from incarceration, the relief that he seeks is indistinguishable from a request to be admitted into this country until his return to Cuba can be arranged. As set forth more fully, *supra*, Rosales has no

Roque, 734 F.2d at 582 (footnote omitted) ("[W]e are compelled to conclude that [immigration] parole is part of the admissions process. As such, its denial or revocation does not rise to the level of a constitutional infringement. Because the Cubans lack a constitutional liberty interest, we need not reach the question of whether the Attorney General's plan satisfies due process."); *Ma*, 208 F.3d at 824 (quoting *Barrera-Echavarria v. Rison*, 44 F.3d 1441, 1450 (9th Cir. 1995)) (citations omitted) ("Noncitizens who are outside United States territories enjoy very limited protections under the United States Constitution. Because excludable aliens are deemed under the entry doctrine not to be present on United States territory, a holding that they have no substantive right to be free from immigration detention reasonably follows.").

While it would indeed shock the conscience to permit the INS to shoot or to torture a person seeking entry into the United States, it is not conscience shocking to allow the INS to enforce its immigration policies by indefinitely detaining such a person at the border when he will not or cannot go elsewhere.[7] The Supreme

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constitutional right to be released into this country, and the government has an absolute right to ensure his exclusion.

[7] As noted, *supra*, the majority does not question the applicability of the "entry fiction," which treats Rosales as if he is being detained at the border, despite his physical presence in the United States. Although the entry fiction may appear to be draconian in operation, it has a humanitarian purpose. The entry fiction is a compassionate response to the hardships that surely would have befallen Rosales if INS representatives had prevented him and other Mariel Cubans from bringing their boats ashore, as the government unquestionably had the right to do. In other words, the United States lawfully could have forced Rosales and the other Mariel Cubans to remain at sea, where they almost certainly would

Court has long held that "an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative." *Landon v. Plasencia*, 459 U.S. 21, 32, 103 S. Ct. 321, 74 L.Ed.2d 21 (1982). "In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." *Mathews*, 426 U.S. at 79-80, 96 S. Ct. 1883. Indeed, "[c]ourts have long recognized that the governmental power to exclude or expel aliens may restrict aliens' constitutional rights when the two come into direct conflict." *Zadvydas*, 185 F.3d at 289.

Consistent with the foregoing principles, the federal circuit courts routinely have rejected constitutional arguments that are similar, if not identical, to the one advanced by Rosales in the present case. Most recently, the Seventh Circuit rejected a substantive due process challenge to indefinite confinement in *Carrera-Valdez v. Perryman*, 211 F.3d 1046 (7th Cir. 2000),[8] reasoning as follows:

> Almost fifty years ago, the Supreme Court held that an excludable alien may be detained inde-

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have died from drowning, dehydration or starvation. Instead, the government allowed Rosales and the others to come ashore, under the entry fiction, which treats the Mariel Cubans as if they are still at sea, and outside of U.S. territory, for immigration purposes.

[8] The facts of *Carrera-Valdez* are similar to those of the present case. The petitioner in *Carrera-Valdez* was a Mariel Cuban who was declared excludable following his arrival in this country. Like Rosales, the petitioner in *Carrera-Valdez* was released several times on immigration parole only to be taken into custody after committing crimes here. He sought a writ of habeas corpus ordering his release until he could be returned to Cuba. *Carrera-Valdez*, 211 F.3d at 1047.

> finitely when his country of origin will not accept his return. *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 73 S. Ct. 625, 97 L.Ed. 956 (1953). Several Justices in more recent years have expressed unease with that decision, but it is conclusive in the courts of appeals. It is therefore not surprising that at least five appellate courts have rejected constitutional challenges, similar to Carrera's, brought by others who arrived on the Mariel boatlift. *See Guzman v. Tippy*, 130 F.3d 64 (2d Cir. 1997); *Palma v. Verdeyen*, 676 F.2d 100 (4th Cir. 1982); *Gisbert v. U.S. Attorney General*, 988 F.2d 1437, *amended*, 997 F.2d 1122 (5th Cir. 1993); *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir. 1995) (*en banc*); *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir. 1986). *See also Chi Thon Ngo v. INS*, 192 F.3d 390 (3d Cir. 1999). The only arguably contrary decision, *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981), has not garnered adherents and is of doubtful vitality in its own circuit. *Duy Dac Ho v. Greene*, 204 F.3d 1045 (10th Cir. 2000). Given *Shaughnessy* there is little point in elaborate discussion by an inferior court. Carrera is not constitutionally entitled to release.

Id. at 1048.[9]

In finding that excludable aliens have no constitutional right to be free from indefinite immigration detention, the federal courts have relied largely upon

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[9] The majority cites *Carrera-Valdez* and *Gisbert* for the proposition that the Attorney General has the *statutory* authority to detain an excludable alien indefinitely, while failing to acknowledge that those cases also stand for the proposition that an excludable alien has no *constitutional* right to be free from indefinite detention.

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 73 S. Ct. 625, 97 L.Ed. 956 (1953), in which the Supreme Court held that an excludable alien may be detained indefinitely, without violating the Constitution, when his country of origin will not accept his return.[10] In *Mezei*, the Court reasoned as follows:

> . . . Aliens seeking entry from contiguous lands obviously can be turned back at the border without more. While the Government might keep entrants by sea aboard the vessel pending determination of their admissibility, resulting hardships to the alien and inconvenience to the carrier persuaded Congress to adopt a more generous course. By statute, it authorized, in cases such as this, aliens' temporary removal from ship to shore. But such temporary harborage, an act of legislative grace, bestows no additional rights. . . . And this Court has long considered such temporary arrangements as not affecting an alien's status; he is treated as if stopped at the border.
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> Thus we do not think that respondent's continued exclusion deprives him of any statutory or constitutional right. . . .

Id. at 215 (citations and footnotes omitted).

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[10] Although the alien in *Mezei* had lived in the United States for approximately 25 years, he left this country in 1948, without authorization or reentry papers, and resided in Hungary for 19 months. *Mezei*, 345 U.S. at 208, 214, 73 S. Ct. 625. In light of those facts, the Supreme Court had "no difficulty in holding respondent an entrant alien or 'assimilated to [that] status' for constitutional purposes." *Id.* at 214, 73 S. Ct. 625 (quoting *Kwong Hai Chew v. Colding*, 344 U.S. 590, 599, 73 S. Ct. 472, 97 L.Ed. 576 (1953)).

The majority reasons that *Mezei* is distinguishable because it was decided in the midst of the Korean War and it involved an individual whom the executive branch had classified as a national security threat. The majority suggests that the *Mezei* Court found no constitutional violation flowing from the alien's indefinite detention precisely because of the national security concerns at issue. Given that such "incomparable exigencies" do not exist in the present case, the majority reasons that *Mezei* is distinguishable.

Having reviewed *Mezei*, I cannot agree with the majority's reading of the opinion. In *Mezei*, the Supreme Court cited the Korean War and national security concerns as the impetus behind the Attorney General's decision to exclude an alien, pursuant to the Passport Act of 1918, which permitted the executive branch "to shut out aliens whose 'entry would be prejudicial to the interests of the United States.'" *Mezei*, 345 U.S. at 210, 73 S. Ct. 625; *see also id.* at 216, 73 S. Ct. 625 (characterizing the alien's continued detention as "[a]n exclusion proceeding grounded on danger to the national security"). "[T]imes being what they [were]," the Court also recognized that Congress had declined to authorize the release of excludable aliens such as Mezei. *Id.* at 216, 73 S. Ct. 625. The *Mezei* Court then noted that it lacked the authority to substitute its judgment for that of Congress with respect to the legislative determination that individuals such as Mezei were to be excluded and not released. *Id.* ("Whatever our individual estimate of [the policy mandating Mezei's exclusion and indefinite detention] and the fears on which it rests, respondent's right to enter the United States depends on the congressional will,

and courts cannot substitute their judgment for the legislative mandate.").

Although national security concerns may have prompted the Attorney General to exclude and to detain Mezei under legislation passed by Congress, the Supreme Court did not rely on national security concerns to support its determination that he lacked a substantive due process right to be free from indefinite detention.[11] Rather, the Supreme Court's constitutional analysis turned on the more fundamental fact that Mezei, an excludable alien, had no constitutional rights at all. *Id.* at 215, 73 S. Ct. 625 (reasoning that Mezei's continued exclusion on Ellis Island did not deprive him of any constitutional rights because he was "treated as if stopped at the border[,]" despite his physical presence in the United States). While Congress had provided for *resident* aliens to be released on bond pending deportation, the *Mezei* Court noted that no similar statutory authority existed for the release of *excludable* aliens. The Supreme Court also recognized that Congress's failure to provide for the release of individuals such as Mezei likely stemmed from fears associated with the Korean War. *Id.* at 216, 73 S. Ct. 625. Although it questioned that congressional policy "and the fears on which it rest[ed]," the Supreme Court upheld Mezei's indefinite detention because, as an excludable alien, *he had no constitutional rights* and his

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[11] In fact, as noted above, the Supreme Court appeared to question whether Mezei was even a true national security risk. *Mezei*, 345 U.S. at 216, 73 S. Ct. 625 ("Whatever our individual estimate of [the policy mandating Mezei's exclusion and indefinite detention] and the fears on which it rests, respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate.").

right to enter the United States depended solely "on the congressional will[.]" *Id.* at 215-216, 73 S. Ct. 625.

Contrary to the majority's assertion herein, the *Mezei* Court did not cite the Korean War and national security concerns as the impetus behind its determination that Mezei's confinement violated no constitutionally protected right. In other words, the Court *did not* suggest that Mezei *would* have had a constitutionally protected liberty interest in freedom from bodily restraint but for the conflict in Korea. To the contrary, the Court found no due process violation because Mezei, an alien seeking initial entry, had no constitutional right to enter the United States at all. *Id.* at 215, 73 S. Ct. 625 ("While the Government might keep entrants by sea aboard the vessel pending determination of their admissibility, resulting hardships . . . persuaded Congress to adopt a more generous course. . . . But such temporary harborage, an act of legislative grace, bestows no additional rights. . . . Thus, we do not think that respondent's continued exclusion deprives him of any statutory or constitutional right."). Absent a constitutional right to enter this country, Mezei simply had no liberty interest in being free from indefinite detention to effect his exclusion. The "exigencies" associated with the Korean War were not crucial to the Court's resolution of this constitutional issue.[12] Rather, those national security concerns merely

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[12] It is noteworthy that the Supreme Court did not even require the Attorney General to divulge the evidence upon which he based his determination that Mezei constituted a threat to national security. *Mezei*, 345 U.S. at 212, 73 S. Ct. 625. The Court's refusal to "retry the determination of the Attorney General" by requiring such evidence to be revealed would be peculiar if the absence of a substantive due process right turned upon exigencies attributable to the Korean War. In other words, if the Supreme Court believed

explained why the Attorney General had exercised his statutory authority to exclude and to detain Mezei. Notably, a number of other circuit courts have also read *Mezei* as standing for the proposition that an excludable alien has no liberty interest in freedom from indefinite immigration detention. *See, e.g., Carrera-Valdez*, 211 F.3d at 1048 ("Almost fifty years ago, the Supreme Court held that an excludable alien may be detained indefinitely when his country of origin will not accept his return. . . . Given [*Mezei*] there is little point in elaborate discussion by an inferior court. Carrera is not constitutionally entitled to release."); *Ma*, 208 F.3d at 823 ("While the Court held that Mezei could be detained indefinitely on Ellis Island, because no country would take him back, it rested its holding on the fact that

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that Mezei lacked a substantive due process right to be free from indefinite detention only because of exigencies created by the Korean War, it seems likely that the Court would have required the Attorney General to present *some evidence* showing that those exigencies actually existed. The Court did not do so, however, for at least two reasons. *First*, Mezei's confinement was an act of exclusion, and the decision of the Attorney General to exclude an alien is "final and conclusive[.]" *Id. Second*, Mezei's continued exclusion on Ellis Island did not deprive him of any constitutional right, not because of national security concerns and the Korean War, but because he was treated as if detained outside of U.S. territory and, therefore, he *had no* substantive due process rights. *Id.* at 215, 73 S. Ct. 625; *see also* Ethan A. Klingsberg, Note, *Penetrating the Entry Doctrine: Excludable Aliens' Constitutional Rights in Immigration Processes*, 98 Yale L.J. 639, 643-644 (1989) (recognizing that *Mezei* rests upon the "principle that an alien arrives at the border without an interest in the right to enter" and, as a result, lacks a liberty interest in freedom from immigration detention). Consequently, the Attorney General's national security concerns were not critical to the *Mezei* Court's substantive due process analysis, despite the majority's assertion to the contrary.

Mezei's exclusion did not violate the immigration statute, and that as an alien who had not yet entered the country he had no other rights."); *Fernandez-Roque*, 734 F.2d at 582.

The majority also asserts that the government's reading of *Mezei* is contrary to "a long line of Supreme Court decisions extending to aliens basic Fifth, Sixth, and Fourteenth Amendment protections. . . ." Most of the decisions upon which the majority relies, however, involved aliens who *had entered* the United States, either legally or otherwise. *See, e.g., Reno v. Flores*, 507 U.S. 292, 113 S. Ct. 1439, 123 L.Ed.2d 1 (1993); *Plyler v. Doe*, 457 U.S. 202, 102 S. Ct. 2382, 72 L.Ed.2d 786 (1982); *Mathews v. Diaz*, 426 U.S. 67, 96 S. Ct. 1883, 48 L.Ed.2d 478 (1976); *Graham v. Richardson*, 403 U.S. 365, 91 S. Ct. 1848, 29 L.Ed.2d 534 (1971); *Wong Wing v. United States*, 163 U.S. 228, 16 S. Ct. 977, 41 L.Ed. 140 (1896); *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L.Ed. 220 (1886).

When considering the constitutional protection to which an alien is entitled, the Supreme Court has long distinguished between aliens who have entered the United States, even if their presence here is illegal, and aliens who have not yet entered this country. *See, e.g., Yick Wo*, 118 U.S. at 369, 6 S. Ct. 1064 (recognizing that the protections of the Fourteenth Amendment extend "to all persons within the territorial jurisdiction" of a state); *Johnson v. Eisentrager*, 339 U.S. 763, 770-771, 70 S. Ct. 936, 94 L.Ed. 1255 (1950) (noting that "presence" in the United States gives an alien certain rights, and acknowledging that the Supreme Court has "extended to the person and property of resident aliens important constitutional guaranties"); *Plyler*, 457 U.S. at 212, 102 S. Ct. 2382 (recognizing that the Fifth, Sixth and Four-

teenth Amendments have a "territorial theme," as the protections provided by those Amendments apply "'to all persons within the territory of the United States,' including aliens unlawfully present"); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 270-271, 110 S. Ct. 1056, 108 L.Ed.2d 222 (1990) (recognizing that various constitutional protections have been afforded to aliens who are present in the United States, whereas aliens who are not voluntarily within this nation's borders have not been granted the same protections).[13]

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[13] In *Verdugo-Urquidez*, the Supreme Court reviewed several of the cases cited by the majority herein. According to the *Verdugo-Urquidez* Court, those cases stand for the proposition that aliens enjoy constitutional protections once they enter the United States:

> Verdugo-Urquidez also relies on a series of cases in which we have held that aliens enjoy certain constitutional rights. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 211-212, 102 S. Ct. 2382, 2391-92, 72 L.Ed.2d 786 (1982) (illegal aliens protected by Equal Protection Clause); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596, 73 S. Ct. 472, 477, 97 L.Ed. 576 (1953) (resident alien is a "person" within the meaning of the Fifth Amendment); *Bridges v. Wixon*, 326 U.S. 135, 148, 65 S. Ct. 1443, 1449, 89 L.Ed. 2103 (1945) (resident aliens have First Amendment rights); *Russian Volunteer Fleet v. United States*, 282 U.S. 481, 51 S. Ct. 229, 75 L.Ed. 473 (1931) (Just Compensation Clause of Fifth Amendment); *Wong Wing v. United States*, 163 U.S. 228, 238, 16 S. Ct. 977, 981, 41 L.Ed. 140 (1896) (resident aliens entitled to Fifth and Sixth Amendment rights); *Yick Wo v. Hopkins*, 118 U.S. 356, 369, 6 S. Ct. 1064, 1070, 30 L.Ed. 220 (1886) (Fourteenth Amendment protects resident aliens). These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country. *See, e.g., Plyler, supra*, 457 U.S., at 212, 102 S. Ct., at 2392 (The provisions of the Fourteenth Amendment "'are universal in their application, *to all persons within the territorial jurisdiction . . .*'") (quoting *Yick Wo, supra*, 118 U.S., at 369, 6 S. Ct., at 1070); *Kwong Hai Chew*,

Without question, aliens who are present in the United States do enjoy significant constitutional protections. In Rosales's case, however, the entry fiction treats him as if he remains detained at the border and *not present* in the United States. *See, e.g., Ma*, 208 F.3d at 824 (quoting *Barrera-Echavarria*, 44 F.3d at 1450) (recognizing that " 'excludable aliens are deemed under the entry doctrine not to be present on United States territory' "). The majority does not dispute the applicability of the entry fiction herein. Consequently, the "long line" of Supreme Court precedent cited by the majority does not controvert the government's reading of *Mezei*, which involved an excludable alien who, under the entry fiction, remained detained at this nation's border and, like Rosales, *was not present* in the United States.[14]

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supra, 344 U.S., at 596, n. 5, 73 S. Ct., at 477, n. 5 ("The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. *But once an alien lawfully enters and resides in this country* he becomes invested with the rights guaranteed by the Constitution to all people within our borders") (quoting *Bridges, supra*, 326 U.S., at 161, 65 S. Ct., at 1455 (concurring opinion) (emphasis added)). Respondent is an alien who has had no previous significant voluntary connection with the United States, so these cases avail him not.

Verdugo-Urquidez, 494 U.S. at 270-71.

[14] Despite the fact that the Fifth, Sixth and Fourteenth Amendments have a "territorial theme" and, therefore, apply "'to all persons within the territory of the United States,'" *Plyler*, 457 U.S. at 212, 102 S. Ct. 2382, some courts have held that excludable aliens may rely upon the Constitution to challenge "governmental action outside of the immigration context." *Fernandez-Roque v. Smith*, 734 F.2d 576, 582 n. 8 (11th Cir. 1984); *see also Gisbert*, 988 F.2d at 1442 (recognizing that excludable aliens have a substantive due process right to be free from "gross physical abuse"); *but see Ma*, 208 F.3d at 824 ("[I]t is not settled that excludable aliens have

In short, Rosales's substantive due process claim is a victim of the entry fiction. As noted above, that doctrine treats an excludable alien "as one standing on the threshold of entry, and therefore not entitled to the constitutional protections provided to those within the territorial jurisdiction of the United States." *Ma*, 208 F.3d at 823. Although Rosales may have a Fifth Amendment liberty interest in not being shot or tortured, he simply has no protected liberty interest in freedom from being detained indefinitely at this country's border.[15] This is so because he has no constitutional right to enter the United States,[16] and the

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any constitutional rights at all [.]"). Even if excludable aliens may challenge governmental conduct *outside* of the immigration context, however, the act of detaining an alien to effect his exclusion from the United States constitutes governmental action *within* the immigration context. As a result, excludable aliens such as Rosales have no substantive due process right to be free from immigration detention. *See, e.g., Ma*, 208 F.3d at 824; *Carrera-Valdez*, 211 F.3d at 1048.

[15] Preventing the INS from killing or torturing Rosales does not infringe upon the government's plenary power to exclude aliens at our borders. Consequently, as noted, *supra*, some courts have recognized that excludable aliens have a protected liberty interest in not being physically abused. Preventing the INS from indefinitely detaining Rosales in order to ensure his exclusion, however, would interfere with the government's fundamental sovereign authority to control its borders.

[16] "It is beyond dispute that aliens have no constitutional right to be admitted into this county." *Fernandez-Roque*, 734 F.2d at 581 (quoting *Landon*, 459 U.S. at 32, 103 S. Ct. 321); *see also Jean*, 727 F.2d at 972 ("[E]xcludable aliens cannot challenge either admission or parole decisions under a claim of constitutional right."). Immigration "[p]arole is an act of extraordinary sovereign generosity, since it grants temporary admission into our society to an alien who would probably be turned away at the border if he sought to enter by land, rather than coming by sea or air." *Id.*

Attorney General has an absolute right to effect his exclusion.[17] "[A] constitutionally protected [liberty] interest cannot arise from relief that the executive exercises unfettered discretion to award." *Tefel v. Reno*, 180 F.3d 1286, 1300 (11th Cir. 1999). Adopting the majority's reasoning would mean that "[a] foreign leader could eventually compel us to grant physical admission via parole to any aliens he wished by the simple expedient of sending them here and then refusing to take them back." *Jean*, 727 F.2d at 975. As a practical matter, such a rule would bestow upon foreign leaders the power to dictate U.S. immigration policy. *Cf. Gisbert*, 988 F.2d at 1447 ("Accepting petitioners' arguments here would allow one country to export its unwanted nationals and force them upon another country by the simple tactic of refusing to accept their return. . . . The United States cannot be forced to violate its national sovereignty in order to parole these aliens within its borders merely because Cuba is dragging its feet in repatriating them."); *Barrera-Echavarria*, 44 F.3d at 1448 ("A judicial decision requiring that excludable aliens be released into American society when neither their countries of origin nor any third country will admit them might encourage

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[17] This is not to say that the Attorney General could detain Rosales indefinitely if some other country were willing to accept him. Under those circumstances, which do not exist here, his continued detention likely would violate the Constitution. In other words, the United States lawfully may detain Rosales in order to regulate its border and prevent him from entering, but it cannot constitutionally prevent him from vacating the border and going elsewhere. Notably, however, Rosales's habeas petition does not suggest that he or his relatives, who are living in Florida, have arranged for him to leave the United States. Instead, he wants to be released into this country.

the sort of intransigence Cuba has exhibited in the negotiations over the Mariel refugees.").

Even assuming, arguendo, that a Fifth Amendment liberty interest is implicated, Rosales's detention, which includes annual review for parole eligibility, is not excessive in relation to the government's concern about protecting society from a criminal alien who previously has committed felony offenses while on immigration parole. In *Alvarez-Mendez v. Stock*, 941 F.2d 956 (9th Cir. 1991), the court reached a similar conclusion with respect to a detained Mariel Cuban, applying the balancing-of-interests approach set forth in *Salerno*, 481 U.S. at 747, 107 S. Ct. 2095, and adopted by the majority herein. In relevant part, the *Alvarez-Mendez* court reasoned as follows:

> A detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. *White v. Roper*, 901 F.2d 1501, 1504 (9th Cir. 1990). Not all detention, however, is punishment. *Bell v. Wolfish*, 441 U.S. 520, 539 n. 20, 99 S. Ct. 1861, 1874 n. 20, 60 L.Ed.2d 447 (1979). In the absence of express intent to punish, the most significant factors in identifying punishment are "whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned [to it]." *United States v. Salerno*, 481 U.S. 739, 747, 107 S. Ct. 2095, 2101, 95 L.Ed.2d 697 (1987) (quotations omitted).
>
> In denying Alvarez-Mendez reparole, the Associate Commissioner cited Alvarez-Mendez's criminal arrests and convictions, and concluded on the basis of these crimes that it was unlikely that Alvarez

> Mendez would "remain non-violent or honor the conditions of parole if released." Protecting society from a potentially dangerous alien is a rational, non-punitive purpose for Alvarez Mendez's detention. Because such protection requires separating Alvarez Mendez from society, and because immediate removal from the country is not possible, detention is not an excessive means of accomplishing such protection.

Id. at 962.

The Fifth Circuit subsequently cited *Alvarez-Mendez* with approval in *Gisbert*, 988 F.2d at 1442, concluding that the continued detention of Mariel Cubans "is not punishment" and is not excessive in relation to the government's rational purpose of protecting society from potentially dangerous aliens. This is particularly true in the present case, given that Rosales continues to receive annual consideration for immigration parole, despite the fact that he has twice committed serious offenses while on such parole. *Cf. Barrera-Echavarria*, 44 F.3d at 1450 ("When viewed in this light, as a series of one-year periods of detention followed by an opportunity to plead his case anew, we have no difficulty concluding that Barrera's detention is constitutional under *Mezei*."); *Chi Thon Ngo v. I.N.S.*, 192 F.3d 390, 398 (3rd Cir. 1999) ("We therefore hold that excludable aliens with criminal records as specified in the Immigration Act may be detained for lengthy periods when removal is beyond the control of the INS, provided that appropriate provisions for parole are available."); *Id.* at 399 ("So long as petitioner will receive searching periodic reviews, the prospect of indefinite detention without hope for parole will be eliminated. In these circumstances, due process will be satisfied.");

Zadvydas, 185 F.3d at 297 n. 19 (noting that "the detention of certain classes of persons to protect society at large is not wholly alien to our constitutional order and has been allowed in special situations when, as here, there are procedures to insure that detention must be periodically reviewed").

In opposition to the foregoing conclusion, the majority reasons that "the strength of the government's interest in protecting the community and enforcing its immigration laws must be considered in relation to the possibility that the government may actually achieve its goal to effect Rosales's deportation." Given that Rosales is unlikely ever to be returned to Cuba, the court concludes that the strength of the government's interest diminishes to the point that it is outweighed by Rosales's liberty interest in freedom from bodily restraint. Specifically, the majority states that "Rosales's confinement can only be considered excessive in relation to the purpose of protecting the community from danger and enforcing an immigration order that is, at present, unenforceable."

By detaining Rosales, however, the government *is enforcing* immigration law and the order excluding Rosales from this country. Under the entry fiction, the applicability of which the majority does not dispute, Rosales is being detained at the border because he has no legal right to enter this country. He continues to have no legal right to enter this country, regardless of how long he remains waiting at the border. Therefore, by refusing to release Rosales into the United States, the Attorney General is unquestionably enforcing immigration policy, which includes not only deporting him but also excluding him. The fact that Cuba will not accept his return does not alter the fact that the

government is enforcing both its immigration law and Rosales's order of exclusion simply by ensuring his exclusion from U.S. territory. Indeed, the *only* way that U.S. immigration policy and the order of exclusion will be rendered "unenforceable" is if this court orders an excludable alien such as Rosales to be released into the general population. Finally, the fact that Cuba will not accept Rosales's return does not alter the fact that the government is ensuring public safety by detaining Rosales, a person who has committed felony offenses in the United States, subject to annual review for purposes of determining his eligibility for immigration parole.[18]

Based on the reasoning and citation of authority set forth above, I conclude that Rosales lacks a liberty interest in freedom from continued detention by the INS. Even assuming, arguendo, that he does possess such an interest, I find that it is outweighed by the government's regulatory interest in enforcing immigration laws and providing for public safety. Consequently, Rosales's indefinite confinement does not violate substantive due process.

In conclusion, I pause briefly to note my agreement with the district court's determination that Rosales's procedural due process rights have not been violated. Although the majority fails to reach this issue, given its finding of a substantive due process violation, the

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[18] The majority appears to find a substantive due process violation in part because Rosales cannot be "certain" of receiving immigration parole, regardless of how well he behaves while he is detained. Given that Rosales has no right to enter this country at all, however, the fact that he cannot be "certain" of being paroled into the United States does not give rise to a substantive due process violation.

Supreme Court has recognized that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *Knauff*, 338 U.S. at 544, 70 S. Ct. 309; *see also Mezei*, 345 U.S. at 212, 73 S. Ct. 625. Consequently, the district court properly examined the Attorney General's Cuban Review Plan, found at 8 C.F.R. § 212.12, to identify the procedural rights at issue. *See, e.g., Garcia-Arena v. Luttrell*, 238 F.3d 420, 2000 WL 1827855 at *2 (6th Cir. Dec. 8, 2000) (unpublished) (recognizing that excludable aliens are entitled to only the procedural rights provided by 8 C.F.R. § 212.12).

The crux of Rosales's argument on appeal does not appear to be that the INS violated the procedure set forth in 8 C.F.R. § 212.12 when it declined to grant him immigration parole. Rather, Rosales appears to argue that the INS violated procedural due process rights emanating from the Constitution.[19] Stated differently,

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[19] As the majority properly notes, Rosales alleged in his habeas petition that he was deprived of his Fifth and Fourteenth Amendment rights (1) to be represented by counsel at the parole hearing, (2) to review the information used against him at that proceeding, and (3) to confront and cross-examine witnesses. Rosales also alleged that the INS had miscalculated his parole candidacy score. In particular, he alleged that the INS had improperly enhanced his score to account for prior criminal offenses, *not* in violation of 8 C.F.R. § 212.12, but rather in violation of the Federal Rules of Evidence, Title 28 of the United States Code and the United States Sentencing Guidelines. J.A. at 6-7. Rosales did allege in his habeas petition, however, that the INS had violated 8 C.F.R. § 212.12 by relying upon impermissible reasons to support its denial of immigration parole. J.A. at 7. Although Rosales does not appear to pursue this claim on appeal, it lacks merit in any event. The INS denied Rosales immigration parole largely because it was unable to conclude that he would not pose a threat to the community, as evidenced by his recidivist criminal behavior. J.A. at

Rosales suggests that the immigration parole procedure contained in 8 C.F.R. § 212.12 is itself deficient because it does not afford him certain due process rights guaranteed by the Constitution.[20] However, in *Betancourt v. Chandler*, 230 F.3d 1357, 2000 WL 1359634 at *2 (6th Cir. Sept. 14, 2000) (unpublished), a panel of this court recently recognized that excludable aliens are entitled to only those procedural rights provided by 8 C.F.R. § 212.12, not the Constitution. Absent a violation of § 212.12, which Rosales has not demonstrated, he has no procedural due process claim.

For the reasons set forth above, I respectfully dissent.

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133. This explanation plainly constitutes a proper basis to deny immigration parole. *See* 8 C.F.R. § 212.12(d).

[20] Insofar as Rosales's appellate brief might be read to assert a violation of 8 C.F.R. § 212.12, any such claim is belied by the record. Among other things, he has been afforded periodic parole review, the services of a translator during his parole interview, decisions translated into Spanish, and notice of his right to have the assistance of a representative during his parole interview. J.A. at 130-139. Although Rosales stresses that he was not represented by counsel during the parole review process, § 212.12 does not guarantee such a right. Furthermore, this court has recognized that an excludable alien has "no constitutional right to counsel at his parole review hearings." *Fernandez-Santana v. Chandler*, 202 F.3d 268, 1999 WL 1281781 at *2 (6th Cir. December 27, 1999) (unpublished). Rosales also contends that, as a result of a language barrier, he was unable "to understand or communicate in lay or legal terms with his keepers." As noted above, however, Rosales was informed of his right to have a representative assist with his parole interview. J.A. at 131.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 98-286

MARIO ROSALES-GARCIA, PETITIONER

v.

J.T. HOLLAND, WARDEN, RESPONDENT

[Filed: May 3, 1999]

MEMORANDUM OPINION AND ORDER

This matter stands submitted before the Court for consideration of the petition of Mario Rosales-Garcia, *pro se*, for writ of habeas corpus, pursuant to 28 U.S.C. § 2241. The respondent has filed a response [Record No. 12], to which the petitioner has replied [Record No. 16].

BACKGROUND OF THE PETITION

On or about May 1, 1980, the petitioner came to the United States from Cuba during the Mariel boatlift. By May 20, he had been granted immigration parole into the United States and released from custody to the sponsorship of a relative in Miami, Florida [Response Exhibits (all hereinafter Ex.) at p.1-2]. By the following October of 1980, the petitioner's lengthy criminal his-

tory in the United States began with what became a series of arrests. Although the petitioner was placed on probation for the first infractions, later criminal activity resulted in several convictions and the imposition of sentences. His first conviction was in July 1981; later convictions in the 1980's included grand theft in 1983 and escape in 1985. His immigration parole was revoked on July 10, 1986. Ex. 6.

After a hearing before an immigration judge in Atlanta, Georgia, on June 26, 1987, the petitioner was found excludable and ordered excluded from the United States. Ex. 65-70.

The petitioner was approved for immigration parole for a second time on April 22, 1988, and was released on May 20, 1988. However, he again engaged in criminal conduct and in 1993 was convicted of conspiracy to traffic in cocaine in the United States District Court for the Eastern District of Wisconsin. While serving his federal sentence, the INS lodged a detainer against him. On March 24, 1997, prior to his release scheduled for May, he was reviewed (Ex. 34) and the decision was made to revoke his second immigration parole and detain him in INS custody upon release from his sentence. Accordingly, upon his release in May of 1997, he was returned to the custody of the INS.

The INS conducted another review pursuant to the parole review procedures for Mariel Cubans at 8 C.F.R. § 212.12 in November of 1997, and on December 12, 1997, the INS Associate Commissioner for Enforcement denied the petitioner immigration parole. His decision (Ex.131-32) noted the petitioner's recidivist criminal behavior when twice previously granted immigration parole into the United States and concluded that the Commissioner was unable to conclude that

petitioner would not violate again or would not pose a threat to the community. See Ex.129-43. This decision was served on the petitioner on February 11, 1998.

BACKGROUND OF THE CASE

On July 9, 1998, Rosales-Garcia filed the instant petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. He challenges the March 24, 1997, decision to revoke his prior parole and his continued detention as being (1) in violation of his Fifth Amendment due process rights, including a right to assistance of counsel, a prior opportunity to review information which would be considered at his hearing, and his right to confront and cross-examine a witness who would provide such information; (2) contrary to INS governing regulations, 8 C.F.R. § 212.12-.13; and (3) based on a point score violative of his rights under 28 U.S.C. § 609(b) and U.S.S.G. A1.2(e)(1) because the score includes points for prior convictions which were both extremely old, 1983 and 1986 convictions, and which involved extremely short sentences. He attached a two-page memorandum of law to the petition.

On October 1, 1998, the Court dismissed the petition, *sua sponte*, concluding that the petitioner's due process rights were not grounded in the Constitution and the Cuban Review Panel's rules and regulations and other authority cited by the petitioner also did not entitle him to the due process safeguards or results he asserted [Record No. 3]. The petitioner then filed a motion to alter and amend [Record No. 5], stating that the due process he intended to argue was not that arising under the Constitution but under 8 U.S.C. § 1101, § 1105a and the provisions of 5 U.S.C. § 551-701, *et seq.*, as well as well-known Supreme Court precedents. Noting its obligation to liberally construe the pro se submissions,

the Court vacated its earlier decision and ordered [Record No. 6] a response to the petition.

RESPONSE

In the response [Record No. 12], the respondent first contends that this Court's initial dismissal was correct and that the petitioner's contentions since that time do not require a different result. He asserts that the petitioner has failed to distinguish his claims from those already rejected by the courts, including the Sixth Circuit, in a case attached to the response, *Gonzalez v. Luttrell*, 100 F.3d 956, 1996 WL 627717 (6th Cir.1996) (Table, unpublished) (affirming the decision from the Eastern District of Kentucky, the Honorable Jennifer B. Coffman, presiding) [Attachment (all hereinafter Att.) No. 1]. In March and November of 1997, the petitioner received the regulatory review for parole, was appropriately denied in the discretionary authority of the Attorney General, and will continue to receive the annual reviews called for under 8 C.F.R. § 212.12(g)(2).

The respondent begins his legal arguments with the caution that judicial review of immigration matters is extremely limited, the power to exclude aliens being a fundamental sovereign attribute exercised by political branches, citing *Kleindienst v. Mandel*, 408 U.S. 753 (1972), and *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953). Therefore, historically the courts have accorded deference in these matters, the respondent citing to numerous cases in various circuits. He also points to recent legislation which has further limited judicial review, most recently in the Illegal

Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA").[1]

As to the petitioner's specific arguments, the respondent contends that the petitioner has no entitlement to parole or the due process safeguards he lists. He again relies on the old *Kleindienst* and *Mezei* cases and multiple cases since that time, holding that an alien seeking admission to this country, even temporarily, has no constitutional rights regarding his application. Nor is there any other source from which an enforceable liberty interest, hence due process rights, would flow. Aliens have only those rights which have been extended to them; Congress has placed aliens' parole in the total discretion of the Attorney General in 8 U.S.C. § 1182(d)(5)(A); detention of aliens by the Attorney General is also specifically provided for under other statutes; and 8 C.F.R § 212.12 sets out what process is due. The respondent contends that the instant petitioner receives all the process he is due so long as he receives the procedures contained therein on an annual basis and that the petitioner's cited cases to the contrary are distinguishable.

The respondent also refutes the petitioner's contention that he is entitled to the adversarial process in the revocation of his parole. Such is not required by the Constitution; the regulatory process, 8 C.F.R. 212.12, which has been upheld in previous constitutional challenges; or the statutes relied upon by the petitioner. Finally, the respondent urges that the petitioner has failed to show an abuse of discretion, not only legally,

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[1] Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Sept. 30, 1996, Pub. L. 104-208, 110 Stat. 3009.

but also factually, when the record includes the petitioner's admitted criminal acts; his later violations of conditions of parole; his reviews under the regulatory procedures; and the Commissioner's use of pertinent factors and conclusions.

REPLY

The petitioner has filed a reply [Record No. 16] in which he repeats and expands on his prior arguments. In addition to claiming that aliens have the asserted procedural due process rights, he contends that the action of the Attorney General in revoking and/or denying him parole constitutes an arbitrary abuse of governmental power, in violation of his substantive due process rights. He submits that certain 1998 and 1999 cases from other circuits support this argument.

DISCUSSION

Background

First, the Court, like the immigration laws themselves and the response herein, distinguishes the language used to differentiate between alien statuses legally. Those undocumented aliens arriving like the Mariel Cubans are immediately inadmissible or "excludable." Those excludable aliens who have been through proceedings and had an order of exclusion entered have been deemed "excluded." Neither have ever been admitted. An "entry fiction" provides that even if an excludable alien is physically present in the United States, legally he is considered to have been detained at the border and never effected entry into this country.[2] He may be allowed to physically enter

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[2] *See Barrera-Echavarria v. Rison*, 44 F.3d 144, 150 (9th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 976 (1995). At the time of

the country on parole initially, pending a later hearing on admissibility, or later, after a decision that he will not be admitted but removed. However, entry on parole is not an admission. Because he was inadmissible or excludable upon arrival, an alien, such as the instant petitioner, often retains the "excludable" descriptor in case law, even if he has been ordered excluded.

A brief historical perspective is also in order.[3] Approximately 125,000 Mariel Cubans arrived in this country in May of 1980, seeking admission. Except for those the U.S. government determined to pose a threat, such as those with serious criminal records or severe mental illnesses, for whom continued detention was ordered, the vast majority of the arrivals were released on immigration parole as excludable aliens pursuant to the usual procedures in 8 U.S.C. § 1182(d)(5). The petitioner was in this majority.

The United States' position then and now has been that Cuba is required, as a matter of international law, to take back its nationals who are denied admission here. In December of 1984, the United States and Cuba entered into "the migration agreement," wherein Cuba agreed to accept 2,746 detained Mariel Cubans at the

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Barrera-Echavarria and the time of this petitioner's exclusion proceedings, before the IIRIRA, there were distinctions between "exclusion" and "deportation" proceedings, but these are now all removal proceedings, set out in 8 U.S.C.§§ 1229 and 1229a (West Supp. 1998). "Removable" is now used for aliens who are inadmissible or "excludable," and for those admitted and then considered deportable. 8 U.S.C. § 1229a(e)(2) (West Supp.1998).

[3] The Court finds the historical discussion in *Padron-Baez v. Warden, FCI, Fairton*, 1995 WL 419799 (D.NJ 1995)(Not reported in F.Supp) helpful and summarizes it briefly.

rate of 100 per month. These were specific persons who either had been kept in detention since arrival in 1980 or whose immigration parole had been revoked between 1980 and the 1984 agreement. Obviously, this agreement did not cover Mariel Cubans whose immigration parole was revoked and inadmissability determined after 1984, such as the instant petitioner. Nor have any subsequent agreements named him as one permitted to return.[4]

In the years after the 1984 agreement, subsequent parole revocations caused a growing number of Mariel Cubans to be detained in United States facilities. In December of 1987, the Attorney General created a new plan for reviewing them for a subsequent parole. The Cuban Review Plan (hereinafter "the Plan"), 8 C.F.R. § § 212.12-.13, under which the petitioner's possible parole must be determined, has applied from 1987 to the present day, with minimal amendments. The regulations specifically provide that the procedures apply to all detained Mariel Cubans, those excludables and those

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[4] Among the attachments to the response is the declaration of Michael E. Ranneberger, Coordinator, Office of Cuban Affairs, in the United States Department of State, regarding immigration discussions with Cuban officials, beginning in 1980 and continuing to the present. Mr. Ranneberger states that in 1984, the two governments agreed to the return of 2,746 of the criminals who arrived from Mariel; as of February 1999, 1,400 of them have been returned. Since the 1984 agreement was not a final list, the officials have met periodically to discuss immigration matters, including the return of Cuban nationals convicted of serious crimes and ordered excluded. Further agreements were reached in 1994 and 1995; and the most recent round of talks took place December 4, 1998. Mr. Ranneberger describes these as sensitive diplomatic exchanges which he cannot reveal, but he can confirm that the return of such nationals remains under discussion between the two governments. Att. 3.

already ordered to be excluded (8 C.F.R. § 212.12(a)), and set out in detail the review procedures to be used. Most importantly, § 212.12(g) provides for a Mariel Cuban's consideration for parole initially when immigration parole is revoked and subsequently every year thereafter.

Jurisdiction of this Court

The Court begins with the issue of its authority to review the immigration parole decisions of the Attorney General. Contending that this Court lacks jurisdiction to review the discretionary parole decision(s) herein, the respondent cites to changes in judicial review wrought by the IIRIRA in several sections, including codifications at 8 U.S.C. § 1252, § 1231(h), and conflicting case law interpreting the issue to date. At most, the respondent suggests, the scope of habeas review, if permissible, is limited to constitutional and statutory issues.

The Court first notes that several provisions in 8 U.S.C. § 1252, which is entitled "Judicial review of orders of removal," reflect Congress' intention to place all authority in the Attorney General and divest this court of jurisdiction to review his decisions.[5] The Court

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[5] 8 U.S.C. § 1252(a)(2)(West Supp. 1998) contains two applicable provisions:

> (B) Denials of discretionary relief
>
> Notwithstanding any other provision of law, no court shall have jurisdiction to review—
>
> (1) any judgment regarding the granting of relief under § 1182(h) . . .
>
> (2) any other decision or action of the Attorney General, the authority for which is specified under this chapter to be in

also notes that 8 U.S.C. § U.S.C. 1226(e) (West 1998), entitled "Apprehension and detention of aliens," also now explicitly provides:

> (e) Judicial review
>
> The Attorney General's discretionary judgment regarding the application of this section shall not be subject to review. No court may set aside any action or decision by the Attorney General under this section regarding the detention or release of any alien or the grant, revocation, or denial of bond or parole.

8 U.S.C. § 1226(e). Thereafter, 8 U.S.C. § 1231, entitled "Detention and removal of aliens ordered removed," contains a sweeping provision in subsection (h).[6]

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the discretion of the Attorney General, other than the granting of relief under § 1158(a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182(a)(2) or 1227(a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227(a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227(a)(2)(A)(i) of this title.

Also, at 8 U.S.C. § 1252(g), the statute provides that "no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter."

[6] 8 U.S.C. § 1231(h) (West Supp. 1998), reads as follows: "Nothing in this section shall be construed to create any substantive or procedural right or benefit that is legally enforceable

Whether viewed one by one or cumulatively, Congress' changes to immigration law contained in both the IIRIRA and the Antiterrorism and Effective Death Penalty Act ("AEDPA")[7], effective earlier in 1996, have whittled away at the judicial review available to aliens. However, do any one or all of these provisions strip this Court of its power to review under federal habeas corpus law? The Court of Appeals in this circuit initially rejected the argument that the new legislation had stripped the Court of this jurisdiction in *Mansour v. I.N.S.*, 123 F.3d 423, 425 (6th Cir. 1997). Presented with an alien seeking judicial review of a deportation order, the Court upheld the constitutionality of the provision barring direct judicial review of a final deportation order, 8 U.S.C. § 1105a(a)(10) (1996), under the rationale that "judicial involvement in the form of habeas review remains available." However, not having been presented with a habeas petition, it specifically reserved for another day the issue of the scope of review that remains available on a petition for a writ of habeas corpus. *Id.* at 426, n. 3.

As the respondent notes, the cases are in conflict on the issue of the Court's jurisdiction after Congress' latest immigration amendments.[8] Obviously, the case

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by any party against the United States or its agencies or officers or any other person."

[7] Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Apr. 24, 1996, Pub. L. 104-132, 110 Stat. 1214

[8] For additional discussions of whether the district courts retain habeas jurisdiction, after the statutory changes of AEDPA and/or IIRIRA, see *Ncube v. INS District Directors and Agents*, 1998 WL 842349 (S.D.NY 1998) (slip opinion at p.7-8); *Rusu v. Reno*, 999 F.Supp. 1204, 1210 (N.D. IL 1998); *Hermanowski v. Farquharson*,___F.Supp.2d___, 1999 WL 111520 (D. RI 1999), slip op. at *5.

law as to AEDPA and IIRIRA provisions will be developing over time. At this time, as the district court concluded in *Oliva v. INS*, 1999 WL 61818 (S.D. NY 1999), in the absence of further clarification from the Court of Appeals in this circuit or from the Supreme Court, this Court finds that it has jurisdiction to entertain a petition for habeas corpus under § 2241. *Id.* at *3. Therefore, the Court will examine all of the issues raised in the instant § 2241 habeas petition to determine if the petitioner is being held in violation of any laws of the United States.

Statutory Claims

The Court begins its analysis on the merits of the petitioner's claims with an examination of the overall immigration and naturalization scheme. Under the Constitution of the United States, control over such matters is vested in the political branches. U.S. Const. Art. I, § 8, cl. 4. Congress has granted total discretionary authority to the Attorney General in Title 8. Aliens and Nationality, Chapter 12—Immigration and Nationality, Subchapter 1, at 8 U.S.C. § 1103, which begins

> (a) Attorney General
>
> (1) The Attorney General shall be charged with the administration and enforcement of this chapter and all other laws relating to the immigration and naturalization of aliens, except insofar as this chapter or such laws relate to the powers, functions, and duties conferred upon the President, the Secretary of State, the officers of the Department of State, or diplomatic or consular officers: *Provided, however*, that determination

> and ruling by the Attorney General with respect to all questions of law shall be controlling.

8 U.S.C. § 1103(a)(1) (West Supp. 1998). This statutory delegation of power and discretion to the Attorney General has been unchanged since its enactment in 1952. Included in this power is the decision whether to parole inadmissible or "excludable" aliens, contained in 8 U.S.C. § 1182.[9] It and the regulation governing re-paroles, 8 C.F.R. § 212.5(d)(2), have been only minimally amended in recent years.[10] With some of the changes, the application of prior or later versions of some statutes matter little. See 8 U.S.C. § 1226.[11]

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[9] 8 U.S.C. § 1182(d)(5)(A)(1998), relied upon by the respondent, provides that the "Attorney General may . . . in [her] discretion parole into the United States temporarily under such conditions as [she] may prescribe only on a case-by-case basis for urgent humanitarian resons or significant public benefit any alien applying for admission to the United States, but such parole of such alien shall not be regarded as an admission of the alien and when the purposes of such parole shall, in the opinion of the Attorney General, have been served the alien shall forthwith return or be returned to the custody from which he was paroled and thereafter his case shall continue to be dealt with in the same manner as that of any other applicant for admission to the United States."

[10] The Court notes that 8 C.F.R. § 212.5 (1998) was last amended 63 FR 31895, June 11, 1998 and at subsection (d)(2)(i) it has been expanded to provide that for aliens whose parole had terminated or been terminated "[i]f the exclusion, deportation, or removal order cannot be executed by removal within a reasonable time, the alien shall again be released on parole unless in the opinion of the district director or the chief patrol agent the public interest requires that the alien be continud in custody." Subsection (f) referring Cuban nationals to 8 C.F.R. § 212.12 and .13, is unchanged.

[11] 8 U.S.C. § 1226(e)(1994), applying to aliens whose exclusion proceedings commenced prior to April 1, 1997, such as the instant petitioner, required the Attorney General to take into custody an

Other statutes, particularly those still relied upon by the petitioner, have undergone substantial change over recent years,[12] but that change is not in the petitioner's favor. The most recent of these changes were contained in the IIRIRA, which reorganized and amended immigration laws significantly,[13] particularly with regard to the Attorney General's detention of aliens.

Among the changes are specific provisions dealing with this petitioner's situation. In 8 U.S.C. § 1226, now entitled "Apprehension and detention of aliens," virtually every paragraph makes clear the Attorney General's power to detain excludable aliens. It begins with the Attorney General's power to arrest, detain, and then release excludable aliens, on bond or conditional parole, pending a decision on removal. 8 U.S.C. § 1226(a) (West 1998). The following subsection, (b), provides that the Attorney General may revoke parole and detain an alien "at any time." 8 U.S.C. § 1226(c). "Detention of criminal aliens," discussed *supra* at footnote 11, explicitly requires the Attorney General to

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excludable alien convicted of an aggravated felony upon release of the alien from his criminal sentence. The current statute (West 1998), now entitled "apprehension and detention of aliens," provides a new subsection, (c), for criminal aliens' detention and possible subsequent parole; however, the Attorney General's obligation to take them into custody is the same.

[12] In addition to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Sept. 30, 1996, Pub. L. 104-208, 110 Stat. 3009, see the Immigration Act of 1990 ("IMMACT"), Nov. 29, 1990, Pub. L. No. 101-649, 104 Stat. 5083; and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Apr. 24, 1996, Pub. L. 104-132, 110 Stat. 1214.

[13] Discussed in *Berehe* v. *INS*, 114 F.3d 159, 161-62 (10th Cir. 1997), and *Reno* v. *American-Arab Anti-Discrimination Committee*, __U.S. __, 1999 WL 88922 (Feb. 24, 1999).

take aliens with criminal convictions into custody upon their release and permits release thereafter only as called for in the statute.[14]

Also, 8 U.S.C. § 1231 (West Supp. 1998), "Detention and removal of aliens ordered removed," provides that after an order of removal, the Attorney General has a 90-day removal period, in which to effect removal and, during that period, "the Attorney General shall detain the alien." Moreover, subsection (d)(1)(A), now specifically provides for prolonged detention "beyond the removal period," with no cap on the time limit to do so, if the excludable or one ordered removed "has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal." *Id.* at (a)(6).[15]

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[14] 8 U.S.C. § 1226(c)(2)(West 1998) provides as follows:

> The Attorney General may release an alien described in paragraph (1) only if [1] the Attorney General decides pursuant to section 3521 of Title 18, that release of the alien from custody is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness, or person cooperating with such an investigation, *and* [2] the alien satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding. A decision relating to such release shall take place in accordance with a procedure that considers the severity of the offense committed by the alien. (Emphasis added.)

[15] 8 U.S.C. § 1231(a)(6) (West Supp. 1998) provides in its entirety:

> (6) Inadmissible or criminal aliens
>
> An alien ordered removed who is inadmissible under section 1182 of this title, removable under section 1227(a)(1)(C),

The petitioner contends he relies upon 8 U.S.C. § 1101, the definition section of the chapter. However, that statute does not support any argument of the petitioner and, in fact, specifically provides that immigration parole is not an admission to the United States in 8 U.S.C. § 1101(a)(13)(B) (West Supp. 1998). To the extent he relies upon 8 U.S.C. § 1105a, "Judicial review of orders of deportation and exclusion," it also is not applicable to his arguments about parole because the petitioner did not appeal the exclusion order against him."[16] The petitioner's current reliance on these statutes, together with his original reliance on the equally inapplicable 28 U.S.C. § 609(b) and sentencing guidelines, is unfounded. Also, the Administrative Procedures Act does not apply to immigration proceedings. *Ardestani* v. *INS*, 502 U.S. 129, 133 (1991).

1227(a)(2), or 1227(a)(4) of this title or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

[16] 8 U.S.C. § 1105a(a)(10)(West Supp. 1998) now reads: "Any final order of deportation against an alien who is deportable by reason of having committed [any of certain enumerated crimes characterized as an aggravated felony or a firearms offense] shall not be subject to review by any court."

To the extent the petitioner intends to rely on an earlier version providing that "any alien held in custody pursuant to an order of deportation may obtain judicial review thereof by habeas corpus proceedings," (8 U.S.C. § 1105a(1)(10)(1995)), § 306(b) of the IIRIRA repealed the previous § 1105a, in its entirety, and replaced it with the current judicial review provisions of 8 U.S.C. § 1252, discussed *supra*, at p. 7.

The Court finds that the Attorney General's authority is not diminished by recent legislation. The Court also finds its conclusions in *Gonzalez* v. *Luttrell* and those of other courts, prior to any statutory changes, still apply. "Because an alien who has not been paroled must by definition be detained, and because Congress has certainly been aware that deportation cannot in all cases be immediately effected, it seems difficult not to conclude that the statutory scheme implicitly authorizes prolonged detention." *Barrera-Echavarria* v. *Rison*, 44 F.3d 1441, 1446 (9th Cir.), cert. denied, 516 U.S. 976 (1995).[17] Especially after the most recent immigration law changes, which provide for prolonged detention and set no time limits, the Attorney General may continue to detain the instant petitioner in conformity with federal law. See *Guzman* v. *Tippy*, 130 F.3d 64 (2nd Cir. 1997); *Perez-Diago* v. *True*, 1999 WL 51821 (D. KS 1999).

Constitutional Claims

The Court also finds no change in the law with regard to the petitioner's constitutional claims since its rejection of this contention in *Gonzalez* v. *Luttrell*.

The Sixth Amendment is not implicated, because "immigration proceedings and detention do not constitute criminal proceedings or punishment." *Ramos* v. *Thornburgh*, 761 F.Supp. 1258, 1260 (W.D LA 1991) (citing *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038

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[17] See also *Gisbert* v. *U.S. Attorney Gerneral*, 988 F.2d 1437, 1443 (5th Cir.), amended, 997 F.2d 1122 (5th Cir. 1993); *Alvarez-Mendez* v. *Stock*, 941 F.2d 956, 960 (9th Cir. 1991), cert. denied, 506 U.S. 842, 113 S. Ct. 127 (1992); *Garcia-Mir* v. *Meese*, 788 F.2d 1446 (11th Cir.), cert. denied, 479 U.S. 889 (1986), all cited in *Gonzalzez* v. *Luttrell*, 100 F.3d 956 (6th Cir. 1996) (Table, unpublished).

(1984)). *Accord, In re Mariel Cuban Habeas Corpus Petitions*, 822 F.Supp. 192, 196 (M.D. PA. 1993); *Barrios* v. *Thornburgh*, 754 F.Supp. 1536, 1542 (W.D. OK 1990); *Sanchez* v. *Kindt*, 752 F. Supp. 1419, 1430-31 (S.D. IN 1990). "It has been recognized that excludable aliens are entitled to some protections under the Sixth Amendment. However, those protections are only available to those excludable aliens who face criminal prosecution." *In re Cuban*, 822 F. Supp. 192, 196 (M.D. PA 1993) (citing *U.S.* v. *Gavilan*, 761 F.2d 226 (5th Cir. 1985) (right to effective counsel)).

Nor does the Fifth Amendment to the Constitution provide excludable aliens with due process rights with regard to admission or parole. Aliens such as the petitioner enjoy only those rights which Congress extends. *Landon* v. *Plasencia*, 459 U.S. 32 (1982). *See also Pena* v. *Thornburgh*, 770 F. Supp. 1153, 1160 (E.D. Tex. 1991) (Mariel Cuban detainee "entitled to only the due process which Congress has provided to him"). This Court finds no basis for petitioner's assetion he enjoys a liberty interest in freedom from detention secured by the Due Process Clause of the Fifth Amendment. The Court finds no validity in the petitioner's contention that his liberty interests springs from other sources, such as the policy of parole in 8 C.F.R. §§ 212.12 or 212.5, public opinion, other even more vague sources. See the discussion of other sources, considered one by one, in *Sanchez* v. *Kindt*, 752 F. Supp. at 1427-1420; *see also Garcia-Mir* v. *Smith*, 766 F.2d 1478, 1451 (11th Cir. 1985), cert. denied, 475 U.S. 1022 (1986).

In the petitioner's Reply [Record No. 16], he argues strongly that it is substantive due process which has been violated in his case; *i.e.*, his indefinite incarceration is an act of the government shocking to the conscience

of the Court and this Court should fashion an appropriate remedy. He cites not only to cases focusing on the importance of fundamental substantive due process rights, but also to a few 1998 and 1999 cases purportedly standing for the proposition that even excludable aliens have the right not to be subjected to an arbitrary abuse of governmental power.

While the law is clear that excludable aliens have only the procedural due process rights afforded by Congress, the law is less clear about the extent to which any substantive due process rights are enjoyed by excludable aliens. The case of *Gisbert* v. *U.S. Attorney General* denied the substantive due process claim of an excludable alien. 988 F.2d at 1447. *But see also Doherty* v. *Thornburgh*, 943 F.2d 204, 209 (2nd Cir. 1991) ("[T]he Supreme Court has questioned the extent to which aliens possess substantive rights under the Due Process Clause.").

The cases cited by the petitioner are clearly distinguishable.[18] More helpful cases are *Ncube* v. *INS District Directors and Agents*, 1998 WL 842349 (S.D. NY 1998) (slip opinion); and *Tam* v. *INS*, 14 F. Supp.2d 1184 (E.D. CA 1998), which, although reaching different conclusions about inadmissible aliens' substantive due process rights, reflect the proper analysis. In con-

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[18] *Campos-Sanchez* v. *INS*, 164 F.3d 448 (9th Cir. 1999), found in favor of an alien with an expired visitor's visa because he had been denied an opportunity to present his testimony in violation of statute and regulations; *United States* v. *Wittgenstein*, 163 F.3d 164 (10th Cir. 1998), confirmed the criminal conviction of an alien for reentry into the United States after deportation; and *Hawkins* v. *Freeman*, 166 F.3d 267 (4th Cir. 1999), did not deal with aliens at all, but a state parolee who was reincarcerated because the state had made a mistake.

formity therewith, this Court finds that the instant petitioner has not presented a substantive due process claim. He has no fundamental right to be free to roam the United States and a fundamental right is the first component of a substantive due process claim. This Court also finds that, based on the petitioner's record, his continued detention is neither arbitrary, conscience-shocking nor oppressive in the constitutional sense and that this Court's intervention is inappropriate. Moreover, the Sixth Circuit has recently expressed the view that "[a]pplying the 'shock the conscience' test in an area other than excessive force . . . is problematic." *Pearson* v. *City of Grand Blanc*, 961 F.2d 1211, 1217 (6th Cir. 1992) (quoting *Cassady* v. *Tackett*, 938 F.2d 693, 698 (6th Cir. 1991); *see also Pusey* v. *City of Youngstown, et al.*, 11 F.3d 652, 657 (6th Cir. 1993), cert. denied, 114 S. Ct. 2742 (1994). Therefore, the petitioner's substantive due process claim must also fail.

To repeat, "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned." *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. at 544. Therefore, this Court examines the Attorney General's Cuban Review Plan, contained at 8 C.F.R. § 212.12-.13, as the due process which must be afforded the petitioner on an annual basis. *Gisbert*, 988 F.2d at 1443; *Rodriguez* v. *Thornburgh*, 831 F. Supp. 810, 813 (D. KS 1993). These detailed procedures still need not and do not comport with either the Fifth or the Sixth Amendment safeguards, which the petitioner asserts should have been afforded him, e.g., prior opportunity to review information against him, an opportunity to face and cross-

examine people who provide information, and/or right to counsel.

Rather, the Cuban Review Plan,[19] as previously discussed, calls for a detained alien to be considered for parole at least once per year. 8 C.F.R. § 212.12(g)(2). Therefore, the petitioner's characterization that his detention has been for an indefinite period of time is misleading. To the contrary, he has had and will continue to have an opportunity on an annual basis to show that since the prior review he would no longer constitute a danger to society if paroled. His detention is not indefinite but is for only one year at a time; at the end of each year he has an opportunity to plead his case anew. *Barrera-Echavarria*, 44 F.3d at 1450.

In each review for parole consideration, both initially and annually every year thereafter, the Plan lists specific factors which must be taken into consideration, including the detainee's past history of criminal behavior, and certain criteria which must be met, including conclusions that the detainee is nonviolent, not likely to violate parole conditions, and not likely to be a threat to the community. *Id.* at (d)(2) and (d)(3). The

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[19] The overall framework of the Plan places the discretion of the Attorney General in an Associate Commissioner for Enforcement ("the Commissioner") or his designate. 8 C.F.R. § (b). If his decision is to continue to detain the alien, he must set forth the reasons; and if his decision is to grant parole, he may impose appropriate conditions. *Id.*; see subsection (f) for required and acceptable conditions. To carry out his duties, the Plan calls for appointment of a Director, who is to maintain files and designate panels to make parole recommendations to the Commissioner. *Id.* at (c). The panels consist of two INS professionals; if the two members are split as to a recommendation, a third member is added and a majority determines the recommendation. *Id.* at (d)(1).

procedures begin with a review of the detainee's file by either the Director of the Cuban Review Plan or a panel. 8 C.F.R. § 212.12(d)(4)(i). If parole is not recommended, then the alien is entitled to a personal interview by a panel. *Id.* at (d)(4)(ii). At this interview, the alien may have someone accompany him, and he may submit any oral or written information he wishes. *Id.* The panel issues a written recommendation, including a brief statement of the factors it deemed material, to the Commissioner, who will consider it, together with the file material, in the exercise of the discretion granted her/him at 8 C.F.R. § 212.12(b). Id. at § 212.12(d)(4)(iii). These procedures have withstood constitutional challenges many times and this Court is in accord with the rationale in *Gisbert* v. *U.S. Attorney General*, 988 F.2d at 1442-44.

The remaining question is whether the instant petitioner was given the process he was due. Government exhibits reveal that the instant petitioner was considered for parole upon release from his federal sentence and was reviewed again before the end of that calendar year. In each review, pursuant to 8 C.F.R. § 212.12, he received consideration by panel members; personal interviews; specific findings with regard to the relevant factors and criteria; and written decisions, in Spanish and English, showing the reasons for the decisions to deny him parole. Regardless of the complained of point count contained in the first panel's recommendation (Ex. 34), the parole decision was made by the designated commissioner, who has the discretion to accept or reject the recommendation.

Therefore, the petitioner's claim that his confinement is in contravention of his due process rights will be dismissed. Consistent therewith and in consideration of

statutory amendments, this Cout finds no violation of federal immigration law or of the United States Constitution.

CONCLUSION

For the foregoing reasons, this Court concludes that the petitioner has not demonstrated that he is being held in custody in violation of the Constitution or laws or treaties of the United States. Accordingly, the Court being advised, IT IS ORDERED that the petition of Mario Rosales-Garcia for writ of habeas corpus is DENIED and judgment shall be entered contemporaneously with this memorandum opinion in favor of the respondent.

This 3rd day of May, 1999.

/s/ KARL S. FORESTER
KARL S FORESTER, JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 98-286

MARIO ROSALES-GARCIA, PETITIONER

v.

J. T. HOLLAND, WARDEN, RESPONDENT

[Filed: May 3, 1999]

JUDGMENT

* * * * * * * * * * * *

In accordance with the Memorandum Opinion and Order entered contemporaneously with this Judgment, the Court hereby ORDERS AND ADJUDGES:

(1) Judgment IS ENTERED in favor of Warden J. T. Holland;

(2) this matter IS DISMISSED WITH PREJUDICE;

(3) this judgment IS FINAL and appealable, and no just cause for delay exists;

(4) the Court CERTIFIES that any appeal would be taken in good faith; and

(5) this matter IS STRICKEN from the active docket.

This the 3d day of May, 1999.

/s/ KARL S. FORESTER
KARL S. FORESTER, JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

99-5683

MARIO ROSALES-GARCIA, PETITIONER-APPELLANT

v.

J. T. HOLLAND, WARDEN, RESPONDENT-APPELLEE

[Filed: Apr. 16, 2001]

ORDER

BEFORE: MOORE and CLAY, Circuit Judges, and RICE,[1] District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original sub-

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[1] Hon. Walter H. Rice, Chief United States District Judge for the Southern District of Ohio, sitting by designation.

mission and decision of the case. Accordingly, the petition is denied. Judge Rice would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN
/s/ LEONARD GREEN, Clerk

APPENDIX E

§ 212.12 Parole determinations and revocations respecting Mariel Cubans.

(a) *Scope.* This section applies to any native of Cuba who last came to the United States between April 15, 1980, and October 20, 1980 (hereinafter referred to as *Mariel Cuban*) and who is being detained by the Immigration and Naturalization Service (hereinafter referred to as the *Service*) pending his or her exclusion hearing, or pending his or her return to Cuba or to another country. It covers Mariel Cubans who have never been paroled as well as those Mariel Cubans whose previous parole has been revoked by the Service. It also applies to any Mariel Cuban, detained under the authority of the Immigration and Nationality Act in any facility, who has not been approved for release or who is currently awaiting movement to a Service or Bureau Of Prisons (BOP) facility. In addition, it covers the revocation of parole for those Mariel Cubans who have been released on parole at any time.

(b) *Parole authority and decision.* The authority to grant parole under section 212(d)(5) of the Act to a detained Mariel Cuban shall be exercised by the Commissioner, acting through the Associate Commissioner for Enforcement, as follows:

(1) *Parole decisions.* The Associate Commissioner for Enforcement may, in the exercise of discretion, grant parole to a detained Mariel Cuban for emergent reasons or for reasons deemed strictly in the public interest. A decision to retain in custody shall briefly set forth the reasons for the continued detention. A decision to release on parole may contain such special conditions as are considered appropriate. A copy of any

decision to parole or to detain, with an attached copy translated into Spanish, shall be provided to the detainee. Parole documentation for Mariel Cubans shall be issued by the district director having jurisdiction over the alien, in accordance with the parole determination made by the Associate Commissioner for Enforcement.

(2) *Additional delegation of authority.* All references to the Commissioner and Associate Commissioner for Enforcement in this section shall be deemed to include any person or persons (including a committee) designated in writing by the Commissioner or Associate Commissioner for Enforcement to exercise powers under this section.

(c) *Review Plan Director.* The Associate Commissioner for Enforcement shall appoint a Director of the Cuban Review Plan. The Director shall have authority to establish and maintain appropriate files respecting each Mariel Cuban to be reviewed for possible parole, to determine the order in which the cases shall be reviewed, and to coordinate activities associated with these reviews.

(d) *Recommendations to the Associate Commissioner for Enforcement.* Parole recommendations for detained Mariel Cubans shall be developed in accordance with the following procedures.

(1) *Review Panels.* The Director shall designate a panel or panels to make parole recommendations to the Associate Commissioner for Enforcement. A Cuban Review Panel shall, except as otherwise provided, consist of two persons. Members of a Review Panel shall be selected from the professional staff of the Service. All recommendations by a two-member Panel shall be

unanimous. If the vote of a two-member Panel is split, it shall adjourn its deliberations concerning that particular detainee until a third Panel member is added. A recommendation by a three-member Panel shall be by majority vote. The third member of any Panel shall be the Director of the Cuban Review Plan or his designee.

(2) *Criteria for Review.* Before making any recommendation that a detainee be granted parole, a majority of the Cuban Review Panel members, or the Director in case of a record review, must conclude that:

(i) The detainee is presently a nonviolent person;

(ii) The detainee is likely to remain nonviolent;

(iii) The detainee is not likely to pose a threat to the community following his release; and

(iv) The detainee is not likely to violate the conditions of his parole.

(3) *Factors for consideration.* The following factors should be weighed in considering whether to recommend further detention or release on parole of a detainee:

(i) The nature and number of disciplinary infractions or incident reports received while in custody;

(ii) The detainee's past history of criminal behavior;

(iii) Any psychiatric and psychological reports pertaining to the detainee's mental health;

(iv) Institutional progress relating to participation in work, educational and vocational programs;

(v) His ties to the United States, such as the number of close relatives residing lawfully here;

(vi) The likelihood that he may abscond, such as from any sponsorship program; and

(vii) Any other information which is probative of whether the detainee is likely to adjust to life in a community, is likely to engage in future acts of violence, is likely to engage in future criminal activity, or is likely to violate the conditions of his parole.

(4) *Procedure for review.* The following procedures will govern the review process:

(i) *Record review.* Initially, the Director or a Panel shall review the detainee's file. Upon completion of this record review, the Director or the Panel shall issue a written recommendation that the detainee be released on parole or scheduled for a personal interview.

(ii) *Personal interview.* If a recommendation to grant parole after only a record review is not accepted or if the detainee is not recommended for release, a Panel shall personally interview the detainee. The scheduling of such interviews shall be at the discretion of the Director. The detainee may be accompanied during the interview by a person of his choice, who is able to attend at the time of the scheduled interview, to assist in answering any questions. The detainee may submit to the Panel any information, either orally or in writing, which he believes presents a basis for release on parole.

(iii) *Panel recommendation.* Following completion of the interview and its deliberations, the Panel shall issue a written recommendation that the detainee be released on parole or remain in custody pending deportation or pending further observation and subsequent review. This written recommendation shall include a brief statement of the factors which the Panel deems

material to its recommendation. The recommendation and appropriate file material shall be forwarded to the Associate Commissioner for Enforcement, to be considered in the exercise of discretion pursuant to § 212.12(b).

(e) *Withdrawal of parole approval.* The Associate Commissioner for Enforcement may, in his or her discretion, withdraw approval for parole of any detainee prior to release when, in his or her opinion, the conduct of the detainee, or any other circumstance, indicates that parole would no longer be appropriate.

(f) *Sponsorship.* No detainee may be released on parole until suitable sponsorship or placement has been found for the detainee. The paroled detainee must abide by the parole conditions specified by the Service in relation to his sponsorship or placement. The following sponsorships and placements are suitable:

(1) Placement by the Public Health Service in an approved halfway house or mental health project;

(2) Placement by the Community Relations Service in an approved halfway house or community project; and

(3) Placement with a close relative such as a parent, spouse, child, or sibling who is a lawful permanent resident or a citizen of the United States.

(g) *Timing of reviews.* The timing of review shall be in accordance with the following guidelines.

(1) *Parole revocation cases.* The Director shall schedule the review process in the case of a new or returning detainee whose previous immigration parole has been revoked. The review process will commence with a scheduling of a file review, which will ordinarily

be expected to occur within approximately three months after parole is revoked. In the case of a Mariel Cuban who is in the custody of the Service, the Cuban Review Plan Director may, in his or her discretion, suspend or postpone the parole review process if such detainee's prompt deportation is practicable and proper.

(2) *Continued detention cases.* A subsequent review shall be commenced for any detainee within one year of a refusal to grant parole under § 212.12(b), unless a shorter interval is specified by the Director.

(3) *Discretionary reviews.* The Cuban Review Plan Director, in his discretion, may schedule a review of a detainee at any time when the Director deems such a review to be warranted.

(h) *Revocation of parole.* The Associate Commissioner for Enforcement shall have authority, in the exercise of discretion, to revoke parole in respect to Mariel Cubans. A district director may also revoke parole when, in the district director's opinion, revocation is in the public interest and circumstances do not reasonably permit referral of the case to the Associate Commissioner. Parole may be revoked in the exercise of discretion when, in the opinion of the revoking official:

(1) The purposes of parole have been served;

(2) The Mariel Cuban violates any condition of parole;

(3) It is appropriate to enforce an order of exclusion or to commence proceedings against a Mariel Cuban; or

(4) The period of parole has expired without being renewed.

No. 01-285

U.S.
NOV 9 2001

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

MARYELLEN THOMS, WARDEN,

Petitioner,

—v.—

MARIO ROSALES-GARCIA,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent, an inadmissible Mariel Cuban with a final order of exclusion, brought a pro se habeas petition challenging his indefinite detention by the Immigration and Naturalization Service. The court of appeals held that respondent's continued detention was unconstitutional. Subsequent to that decision, the government released respondent in the exercise of its own discretion on the ground that he did not pose a danger. Thereafter, this Court decided *Zadvydas v. Davis*, __ U.S. __, 121 S.Ct. 2491 (2001), holding that the Immigration and Nationality Act does not authorize the indefinite detention of admitted aliens and that such detention would pose a serious constitutional problem.

On October 11, 2001, subsequent to the government's filing of this petition, a different panel of the court of appeals upheld the indefinite detention of a Mariel Cuban similarly situated to the respondent. *Carballo v. Luttrell*, No. 99-5698, __ F.3d __, 2001 WL 1194699 (6th Cir. Oct. 11, 2001). The *Carballo* court stated that the decision in this case "cannot survive" *Zadvydas*. The questions presented are:

1. Whether, in light of *Carballo* as well as the government's voluntary release of respondent into the community, remand to the court of appeals is warranted.

2. Whether, even in the absence of *Carballo*, remand of respondent's case in light of *Zadvydas* would be warranted, given that *Zadvydas* did not address the constitutionality of indefinite detention of excludable aliens and that the statute at issue there also applies to "inadmissible" aliens.

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Respondent adopts petitioner's statement of the opinions below.

JURISDICTION

Respondent does not contest this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

In addition to the provisions referred to in the Petition for *Certiorari* and reprinted in Petitioner's Appendix:

8 U.S.C. §1231(a)(6) (2001) provides:

> (a) Detention, Release, and Removal of Aliens Ordered Removed
>
> (6) Inadmissible or criminal aliens
>
> An alien ordered removed who is inadmissible under section 212, [8 U.S.C. §1182] removable under section 237(a)(1)(C), 237(a)(2), or 237(a)(4) [8 U.S.C. §1227(a)(1)(C), (a)(2), or (a)(4)], or who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3).

STATEMENT OF THE CASE

Respondent is in general agreement with the statement presented by petitioner, except for its contention that respondent's detention is governed by former 8 U.S.C.

§1226(e) (1994). Pet. Br. at 8.[1] Respondent submits that his detention post-April 1, 1997, was governed by and continues to be governed by 8 U.S.C. §1231(a)(6), the statute construed by this Court in *Zadvydas v. Davis*, __ U.S. __, 121 S.Ct. 2491 (2001). *See* Point 2.b., *infra*. The following additional points, some of which were included in petitioner's statement, are set forth for further emphasis:

1. *Administrative and District Court Proceedings Leading up to Court of Appeals' Decision.* Respondent has lived in this country for more than 21 years. He was placed in exclusion proceedings in 1987 and received an order of exclusion later that year. Pet. App. at 4a-5a. The government has been unable to effectuate his removal since Cuba will not take him back. Pet. App. at 5a & n.4.

In May 1997, respondent was detained by the Immigration and Naturalization Service (INS) following completion of a federal sentence. Pet. App. 6a. The INS panel that reviewed respondent's custody noted that he had demonstrated "good conduct" while in prison, had received his GED equivalence and had participated in other classes and rehabilitative programs. Pet. App. at 7a n.6. Nonetheless, it decided against his release. *Id.* Respondent remained in INS detention for approximately four years. Pet. App. at 7a, 16a.

2. *The Court of Appeals' Decision.* On January 31, 2001, the court of appeals issued its decision. The court first held that respondent's detention was governed by former 8 U.S.C. §1226(e) and that this section expressly authorized his indefinite detention. Pet. App. at 20a-23a.

---

[1] The court of appeals' opinion states that in May 1997, respondent "was returned to INS custody, pursuant to 8 U.S.C. §1226(e) (1994)." Pet. Br. at 8 (citing Pet. App. 6a). However, respondent disputes that his detention was governed by that statute at that time.

As set forth *infra*, respondent submits that this decision was in error and that his detention is governed by 8 U.S.C. §1231(a)(6), the same statute that this Court in *Zadvydas* construed as not authorizing indefinite detention. *See* Point 2.b., *infra*.

The court next held that respondent's detention violated substantive due process. The court acknowledged the long-standing distinction in immigration law between the constitutional protection afforded to inadmissible aliens like the respondent who are stopped at the border before entering the country (also referred to as "excludable" aliens), as compared to those aliens who have made an entry (also referred to as "deportable" or "removable" aliens). Pet. App. 24a-26a. It also acknowledged the "entry fiction" by which excludable aliens, even though physically present in the United States, are not deemed to have made an entry but rather to be stopped at the border. *Id.* The court held, however, that under this Court's precedent, excludable aliens are protected by the Constitution. Pet. App. 27a-29a. It distinguished this Court's decision in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953)(upholding indefinite detention of an alien ordered excluded on national security grounds) as inapplicable to the respondent whose detention raised no national security concerns. Pet. App. 29a-33a. In addition, the court disagreed with the government and the decisions of other courts of appeals that the existence of periodic review procedures saved the respondent's detention from being indefinite. Pet. App. at 43a-44a. The court also noted that respondent was not asking to be able "to roam the United States," as the district court had found, but merely to be free from prolonged indefinite detention. Pet. App. at 10a.

The court also rejected the government's argument that, because respondent had been approved for release to a half-way house, the case was moot. Pet. App. at 15a-17a. The

court noted that INS regulations allow INS to revoke parole at any time. Pet. App. at 18a & n.15 (citing 8 C.F.R. §212.12(h)). The court thus reasoned that, even if respondent was subsequently released from detention, the case would fall under the exception to the mootness doctrine for cases that are "capable of repetition yet evading review." Pet. App. at 18a-19a.

The government thereafter filed a petition for rehearing and request for *en banc* review. In its petition the government informed the court that respondent was expected to be released to a halfway house within two weeks. The government also renewed its argument that respondent's release from custody would moot the case. While the petition for rehearing was pending, INS released respondent to a halfway house. Pet. Br. at 13. Thereafter, the court of appeals denied the petition.

3. *Relevant Developments since Court of Appeals' Decision.* Shortly after the petition for rehearing and *en banc* review was denied, respondent completed the halfway house program and INS released him into the community. This release was based on the government's determination that respondent's release posed no threat to the community. *See* 8 C.F.R. §212.12(d)(2). Since his release, respondent has been gainfully employed full time and otherwise complying with the INS's conditions of supervision.

After the court of appeals' ruling, this Court issued its decision in *Zadvydas*, a case that involved the indefinite detention of aliens who had previously been lawfully admitted to the United States, who had been ordered deported, but whose removal could not be effectuated. This Court held that the Immigration and Nationality Act, 8 U.S.C. §1231(a)(6), did not authorize continued detention where removal was not reasonably foreseeable, in light of the serious constitutional problem that would be presented by

the indefinite detention of such aliens. *Zadvydas v. Davis*, 121 S.Ct. at 2502-03. This Court rejected the government's argument that indefinite detention was authorized by *Mezei*, noting the longstanding constitutional distinction between aliens who have entered the United States and those who are stopped at the border. 121 S.Ct. at 2500. Because *Mezei* was distinguishable on this ground alone, this Court expressly noted that it did not need to address the parties' other arguments for why *Mezei* was not controlling. 121 S.Ct. at 2501. This Court acknowledged that its decision concerned only aliens who had been admitted to the United States. At the same time, it rejected the government's argument that because an alien who has been ordered deported has no right to remain in the United States, he therefore has no right to be free from "an indefinite term of imprisonment." *Id.* at 2502. In doing so, it also rejected the government's argument that the existence of periodic review procedures saved the detention from being "indefinite." *Id.*

Subsequent to *Zadvydas* and the government's *certiorari* petition in this case, a different panel of the Sixth Circuit again addressed the question of the indefinite detention of an excludable Mariel Cuban. *See Carballo v. Luttrell*, No. 99-5698, _ F.3d _, 2001 WL 1194699 (6th Cir. Oct. 11, 2001). The court of appeals in *Carballo* upheld the detention as authorized by statute and as permitted by the Constitution. It specifically rejected the Sixth Circuit's earlier decision in this case on the ground that it "[could] not survive the Supreme Court's decision in *Zadvydas*." *Id.* at *14. *Carballo* arose in the context of a successive habeas corpus action challenging the petitioner's detention. The *Carballo* court held that the petition was barred notwithstanding the decision in respondent's case because the prior decision was "fatally undermined" by *Zadvydas*. In particular, *Carballo* ruled that *Zadvydas* had affirmed the continuing vitality of *Mezei* and that *Mezei* in turn allowed indefinite detention.

REASONS FOR DENYING THE WRIT

The government filed this petition on August 14, 2001, following this Court's decision in *Zadvydas*, and prior to the court of appeals' subsequent decision in *Carballo v. Luttrell*. Rather than asking for plenary review, the government asks that the decision in respondent's case be vacated and remanded for reconsideration by the court of appeals in light of *Zadvydas*. In addition, it argues that remand would allow the court of appeals to reconsider the issue of mootness in light of respondent's current release into the community. Pet. Br. at 15.

Respondent disagrees that this Court should grant *certiorari*, vacate the decision below and remand the case to the court of appeals in light of *Zadvydas*. First, whatever merit the government's suggestion may have had when initially filed, no purpose would be served by a remand now that the court of appeals, in *Carballo*, has itself issued a post-*Zadvydas* decision that rejects the reasoning and result of the decision below and upholds the constitutionality of indefinite detention of inadmissible aliens. *See* Point 1.a., *infra*. Nor is remand warranted to allow the court of appeals to reconsider the correctness of the result in respondent's individual case because the government itself has already determined that respondent's release presents no danger and has released him as a matter of discretion *See* Point 1.b., *infra*. For these same reasons, remand is not warranted for the court to reconsider the issue of mootness. Indeed, the government makes no suggestion that the mootness issue, in itself, is of such significance to warrant remand. *See* Point 1.c. *infra*. Finally, even in the absence of the court of appeals' decision in *Carballo*, remand would not have been warranted since *Zadvydas* does not undermine the court of appeals' decision to order respondent's release. *See* Point 2, *infra*.

1.a. The government argues that remand of the case below is necessary because the court of appeals' holding that the indefinite detention of an inadmissible alien violates substantive due process conflicts with this Court's decision in *Zadvydas*.[2] However, whatever merit this argument might have had when the government filed its petition has now disappeared in light of the court of appeals' recent decision in *Carballo*. As noted above, in *Carballo*, a different panel of the court of appeals upheld as constitutional the government's continued detention of an inadmissible Mariel Cuban. In reaching this result, the court stated that its prior decision in respondent's case "cannot survive" this Court's decision in *Zadvydas*. *Carballo*, 2001 WL 1194699 at *14. Thus, the precise constitutional issue identified by the government in its petition has now been decided in the government's favor.

For reasons discussed below, respondent believes that *Carballo*'s statutory and constitutional analysis is in error. *See* Point 2, *infra*. However, *Carballo* expressly adopts the

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[2] The government also argues that the court of appeals' decision conflicts with the decisions of eight other courts of appeals. Pet. Br. at 19-20 (citing *Carrera-Valdez v. Perryman*, 211 F.3d 1046 (7th Cir. 2000); *Ho v. Greene*, 204 F.3d 1045 (10th Cir. 2000); *Chi Thon Ngo v. INS*, 192 F.3d 390 (3d Cir. 1999); *Guzman v. Tippy*, 130 F.3d 64 (2d Cir. 1997); *Barrera-Echavarria v. Rison*, 44 F.3d 1441 (9th Cir.)(*en banc*), *cert. denied*, 516 U.S. 976 (1995); *Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied*, 479 U.S. 889 (1986); *Gisbert v. United States Attorney General*, 988 F.2d 1437, *amended*, 997 F.2d 1122 (5th Cir. 1993); *Palma v. Verdeyen*, 676 F.2d 100 (4th Cir. 1982)). However, all of these cases were decided prior to this Court's decision in *Zadvydas*. *See, e.g.*, n.6, *infra* (noting how *Zadvydas* calls into question the reasoning of these decisions). Indeed, cases are already pending in a number of these circuits which revisit this issue in light of *Zadvydas*. Depending on the outcome of those cases, the issue presented here may well come before this Court. At the present time, however, there is no circuit conflict to warrant *certiorari* review.

government's view of the constitutional issue presented by this case, namely that indefinite detention of an inadmissible alien who cannot be removed does not violate due process. Pet. Br. at 17; *Carballo*, 2001 WL 1194699 at *14. In doing so, *Carballo* endorses the government's view of both *Zadvydas* and *Mezei*. Pet. Br. at 16-19; *Carballo*, 2001 WL 1194699 at *12-*14. Thus, the law of the Sixth Circuit is not what it was when the government sought *certiorari* and the holding of *Rosales* has been rejected by the decision in *Carballo*. Hence, this case no longer presents an issue worthy of this Court's attention or of national significance and eliminates any conflict among the circuits that might have existed before *Carballo* was decided.

b. Moreover, the effect of the court of appeals' decision on the detention of the individual respondent is not a basis for any action by this Court. *First*, the government itself has decided to release respondent as a matter of discretion on the ground that he is not a danger to the community. Second, even if respondent's release were solely because it was compelled by the court of appeals' decision (which it was not), the ruling is not worthy of review or remand because the issue is limited to the correctness of this single ruling with no application to other individuals. The government has already released respondent into the community in the exercise of its own discretion. Pet. Br. at 15. On or about March 22, 2001, the government released respondent into a halfway house. Pet. Br. at 13. Respondent completed the halfway house program in less than two months, and on May 16, 2001, the government released him into the community under minimal conditions of supervision. Pet. Br. at 14, 15. Since his release from a halfway house in May, respondent has been working and otherwise complying with his conditions of supervision.

In making its decision to release the respondent, the government necessarily found that he poses no threat to the

community, that he is nonviolent, and that he is not likely to violate the conditions of his parole. *See* 8 C.F.R. §212.12-(d)(2) (setting forth conditions that must be satisfied before parole of Mariel Cuban will be granted). Moreover, should he violate these conditions, he would be subject to prosecution and reincarceration under 8 U.S.C. §1253. *See also Zadvydas*, 121 S.Ct. at 2502, 2504. Thus, remand of this case to the court of appeals for the sole purpose of changing the ruling in respondent's individual case is not warranted.

c. For these same reasons, remand is not warranted to give the court of appeals an opportunity to reconsider the issue of mootness. The government argues that the court of appeals erred in its application of the "capable of repetition yet evading review doctrine." Pet. Br. at 23-24. However, even if this were the case -- which respondent disputes[3] -- it would not be a basis for remand. The government points to no intervening decision by this Court that might cause the court of appeals to reach a different result.[4] Nor does the

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[3] The government argues that revocation of respondent's parole "is uniquely within [his] control," citing the regulatory provision that authorizes revocation of parole when an alien violates conditions of release. Pet. Br. at 23 (citing 8 C.F.R. §212.12(h)(2)). However, the regulations also allow INS to revoke parole solely based on a discretionary determination that "the purposes of parole have been served." *See* 8 C.F.R. §212(h)(1). Thus, respondent can be returned to detention even without "engag[ing] in criminal activity or otherwise violat[ing] the conditions of his release." Pet. Br. at 23.

[4] The government argues that INS's discretionary release of respondent into the community is an intervening development sufficient to warrant remand, since the court of appeals was not actually presented with this situation when it rendered its opinion. Pet. Br. at 22-25. However, as the government acknowledges, the court of appeals specifically considered the prospect of respondent's release when it rendered its decision. Pet. Br. at 10 (citing Pet. App. 18a-19a); *id.* at 23. It is thus highly unlikely that remand would lead to a different result.

government suggest that the mootness issue, in itself, is of such significance to warrant action by this Court.

2. As set forth above, the Sixth Circuit's decision in *Carballo* negates the appropriateness of a remand of this case for reconsideration in light of *Zadvydas*. However, even in the absence of *Carballo*, a remand would not be warranted because nothing in *Zadvydas* undermines the court of appeals' decision to order respondent's release. Rather, *Zadvydas* provides an alternative basis for that decision, namely that the statute does not authorize his continued detention.

a. The government argues that "*Zadvydas* confirms the correctness" of those courts of appeals that have upheld the indefinite detention of Mariel Cubans, and that "the reasoning and result [of the decision in respondent's case] cannot be reconciled with *Zadvydas*' reading of *Mezei*." Pet. Br. at 20. However, in *Zadvydas* this Court specifically stated that it was not addressing the question presented here, *i.e.*, whether indefinite detention of inadmissible aliens, such as the respondent, would be constitutional. *See Zadvydas*, 121 S.Ct. at 2495 ("Aliens who have not yet gained initial admission to this country would present a very different question"). Thus, the court of appeals' constitutional holding does not conflict with *Zadvydas*. It merely addresses an issue that the Court did not expressly reach.

Moreover, the constitutional reasoning of the decision in respondent's case is entirely consistent with, and even reinforced by, *Zadvydas*'s analysis. The government emphasizes that *Zadvydas* affirmed the longstanding constitutional distinction between deportable and excludable aliens and that this Court distinguished *Mezei* on that basis. Pet. Br. at 16-17. However, the court of appeals acknowledged the distinction between excludable and deportable aliens. Pet. App. at 25a-26a ("Rosales does not challenge the govern-

ment's application of the "entry fiction" to his case"). Its decision is based on the separate proposition that even excludable aliens "are not wholly without constitutional protection," that they have a right "to be free from punishment without trial," and that, in the absence of national security concerns, the indefinite detention of respondent had "crossed the line from permissive regulatory confinement to impermissible punishment without trial." Pet. App. at 27a, 46a. The court of appeals thus distinguished *Mezei* as limited to the particular national security concerns that were present in that case. Pet. App. at 30a-33a. That question was not at issue in *Zadvydas*. *See Zadvydas*, 121 S.Ct. at 2501 (expressly noting that, in light of the excludable/deportable distinction, the Court did not need to consider other arguments for distinguishing *Mezei*).[5]

b. Furthermore, this Court's decision in *Zadvydas* provides an alternative statutory basis for the court of appeals' decision ordering respondent's release -- namely that the governing statute does not authorize his continued detention. The court of appeals applied the wrong statute to respondent's detention. *See* Pet. App. at 20a (applying former §1226(e)). The correct statute, §1231(a)(6), does not

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[5] Indeed, in many respects *Zadvydas* supports the constitutional reasoning of the decision below, while calling into question the decisions of the eight other courts of appeals that the government cites as upholding the detention of excludable aliens. Pet. Br. at 19-20. *Compare Zadvydas*, 121 S.Ct. at 2502 (holding that existence of periodic review procedures does not save detention from being indefinite); Pet. App. at 43a-44a (same), *with Barrera-Echavarria*, 44 F.3d at 1450 (detention not indefinite because of review procedures); *see also Zadvydas*, 121 S.Ct. at 2513 (Kennedy, J., dissenting)(describing majority's reasoning in *Zadvydas* as "remarkably similar" to the reasoning of the court of appeals' decision in respondent's case).

authorize indefinite detention. *See Zadvydas*, 121 S.Ct. at 2503.[6]

In *Zadvydas*, this Court held that §1231(a)(6), which was enacted by the Illegal Immigration and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-625 (IIRIRA), and took effect on April 1, 1997, does not authorize detention when removal is not reasonably foreseeable. *Zadvydas*, 121 S.Ct. at 2503. *Zadvydas* applied this statute not only to an admitted alien with a post-April 1, 1997 removal order, but also to an alien with a final order of deportation issued before April 1, 1997. *Id.* at 2496. Consistent with *Zadvydas*, respondent's detention is governed by the same statute even though he was ordered excluded prior to 1997. The fact that respondent has a final order of exclusion rather than a final order of deportation is immaterial because the statute does not distinguish between the two.[7] Thus, because his removal to Cuba is not reasonably foreseeable, his detention is not authorized.

The government contends that respondent here is governed by a different statute. It argues, and the court of appeals held, that detention of aliens with final orders of removal issued before 1997 is governed by pre-1997 law. This argument is based on the effective date language in

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[6] Even if this Court were to find that respondent's detention is governed by former §1226(e) rather than §1231(a)(6), this Court's statutory analysis in *Zadvydas* calls into doubt the government's position, adopted by the court of appeals, that this statute *expressly* authorizes indefinite detention. *Compare* Pet. App. at 22a-23a (noting lack of limiting language in §1226(e) and lack of express exception for situation where removal cannot be effectuated) *with Zadvydas*, 121 S.Ct. at 2502-03 (noting that neither of these features constitute express authorization for indefinite detention).

[7] *See* 8 U.S.C. §1231(a)(6) (authorizing post-final order detention of an alien "who is inadmissible . . . [or] removable").

IIRIRA.[8] The government states that "because respondent was in exclusion proceedings before the April 1, 1997, effective date of [IIRIRA]," his detention is not governed by §1231(a)(6) but rather by former §1226(e). Pet. Br. at 17-18 n.4. This reasoning cannot be reconciled with *Zadvydas*, where this Court -- at the government's urging -- applied §1231(a)(6) to Zadvydas even though he had been ordered deported *prior* to IIRIRA's effective date. *See Zadvydas*, 121 S.Ct. at 2496 (noting that petitioner Zadvydas was ordered deported in 1994); *see also Zadvydas v. Underdown*, 185 F. 3d 279, 286 (5th Cir. 1999)(adopting government's argument that, because Zadvydas received a final order of deportation prior to April 1, 1997, he was not "in deportation proceedings" at the time IIRIRA took effect and was thus governed by post-April 1, 1997 law). The government offers no explanation for why an alien with a pre-April 1, 1997 exclusion order is deemed "in exclusion proceedings" for the purpose of IIRIRA's effective date, while a similarly situated deportable alien is deemed *not* "in deportation proceedings" and thus subject to the new regime.

The government's further argument -- that even if respondent's detention was governed by §1231(a)(6), this Court's statutory ruling in *Zadvydas* does not apply equally to excludable aliens -- is also without merit. *See* Pet. Br. at 17-18 n.4. The government justifies its position on the grounds that "the serious constitutional doubts that informed the Court's decision in [*Zadvydas*] do not apply to the detention of [excludable] aliens." *Id.* However, even if the indefinite detention of excludable aliens were found to present *no* serious constitutional problem, there is no basis for

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[8] IIRIRA §309(c)(1) states that, in general, the amendments made by IIRIRA "do not apply . . . in the case of an alien who is in exclusion or deportation proceedings before the [April 1, 1997] effective date." IIRIRA §309(c)(1), 110 Stat. 3009-625.

construing a single statutory provision to contain a different substantive detention authority depending on whether an alien is "deportable" or "excludable." Nothing in the text or structure supports such different interpretations. *See, e.g.*, *Zadvydas*, 121 S.Ct. at 2513 (Kennedy, J., dissenting) ("[T]hat Mariel Cubans and other illegal, inadmissible aliens will be released . . . would seem a necessary consequence of the majority's construction of the statute").

CONCLUSION

In sum, in light of the court of appeals' recent decision in *Carballo* and the other reasons stated herein, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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Dated: November 9, 2001

SUPREME COURT, U.S.
FILED
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MARYELLEN THOMS, WARDEN, PETITIONER

v.

MARIO ROSALES-GARCIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 01-285

MARYELLEN THOMS, WARDEN, PETITIONER

v.

MARIO ROSALES-GARCIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. The petition shows, and respondent appears to concede, that the Sixth Circuit's holding that 8 U.S.C. 1226(e) (1994) is unconstitutional as applied to respondent created a conflict among the courts of appeals and presents a constitutional question "of national significance." Br. in Opp. 8; see Pet. 14-25. Respondent nevertheless argues (Br. 8) that this case "*no longer* presents an issue worthy of this Court's attention" (emphasis added) because, on October 11, 2001, the Sixth Circuit issued an opinion in *Carballo* v. *Luttrell*, No. 99-5698, 2001 WL 1194699. The panel opinion in *Carballo* held—consistent with the position of the government in the certiorari petition—that the court of appeals' decision in this case "cannot survive the Supreme Court's decision in *Zadvydas* [v. *Davis*, 121 S. Ct. 2491 (2001),] and that under the analysis of [*Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206 (1953),] the Fifth Amendment does not present an obstacle to the potentially indefinite detention of an excludable alien."

2001 WL 1194699, at *14. Respondent asserts (Br. 7-8) that the petition should be denied in light of the panel opinion in *Carballo*.

On November 23, 2001, however, the Sixth Circuit granted a *sua sponte* call for rehearing en banc in *Carballo* and vacated the decision and judgment of the panel in that case. App., *infra*, 1a-2a. The Sixth Circuit's judgment in this case still stands. Respondent's principal argument against granting the petition—that the Sixth Circuit has itself corrected the error identified by the government—thus fails. Unless the erroneous decision of the court of appeals is vacated by this Court, it will be the law of the Sixth Circuit and the courts of appeals will be in conflict.

The possibility that the Sixth Circuit might change its position at some future time, in the *Carballo* case or otherwise, does not warrant leaving the judgment in this case standing, especially where the court of appeals has held an Act of Congress unconstitutional. That is all the more true because the government's petition does not seek plenary review, but rather requests only that the judgment of the court of appeals be vacated and the case remanded to that court for further consideration in light of *Zadvydas*. It should be noted that if the court of appeals' constitutional holding in this case were allowed to stand, and if the en banc Sixth Circuit then held in *Carballo* that the alien's detention was impermissible on statutory grounds, then the panel's erroneous decision in this case would remain as circuit precedent on the constitutionality of an Act of Congress that does authorize continued detention in a case such as this.

2. Respondent further argues (Br. 8-9) that respondent's release on immigration parole pursuant to conditions imposed by the Immigration and Naturalization

Service (INS) lessens the importance of this case because it is equivalent to the habeas relief awarded by the court of appeals. That is incorrect. In respondent's own view (Br. 9), the court of appeals' decision prevents the INS from returning respondent to custody for violating the terms of his immigration parole. See generally 8 C.F.R. 212.12(h)(2); *Zadvydas*, 121 S. Ct. at 2504 (noting that aliens may be returned to custody based on violation of conditions of release). Respondent asserts (Br. 9) that the government would have to commence and prevail in a new criminal prosecution before it could take him back into detention. Given that respondent has twice before violated the terms of immigration parole, see Pet. 4-5, 7-8, the government's ability to protect the public against possible additional wrongdoing by enforcing respondent's conditions of release is a matter of considerable significance.

3. Respondent next claims (Br. 9-10) that the mootness issue in this case is not "in itself" sufficient grounds to grant the petition. *Id.* at 10. We do not suggest that a remand would be warranted solely so that the court of appeals could reconsider its mootness holding in light of respondent's release on parole. But given the court of appeals' error in holding an Act of Congress unconstitutional, which has *not* been corrected, the changed factual circumstances relating to mootness provide an additional reason why vacating and remanding is appropriate. See Pet. 22-24.

4. The petition answered respondent's subsidiary contention that the court of appeals' constitutional holding does not actually conflict with *Zadvydas* and *Mezei*. See Pet. 15-19. Indeed, respondent's arguments that the *Zadvydas* Court expressed no view on the application of its decision to excludable aliens (Br. 10) and that the Court's holding in *Mezei* turned on

"particular national security concerns" (*id.* at 11) are meritless. This Court held in *Zadvydas* that "a basic territorial distinction" separated the removable alien in that case from the excludable alien in *Mezei*, 121 S. Ct. at 2501, and that this territorial distinction "made all the difference" in due process analysis, *id.* at 2500. The court of appeals should be given an opportunity, on remand, to recognize the critical constitutional difference between deportable aliens and aliens denied admission, and to bring its jurisprudence into line with that of every other court of appeals that has considered the constitutionality of detaining the latter group of aliens under former Section 1226(e). See Pet. 19-20 (citing cases); see also *Ma* v. *Ashcroft*, 257 F.3d 1095, 1106-1109 (9th Cir. 2001) (after *Zadvydas*, relying on constitutional distinction between detention of aliens admitted to United States and aliens not admitted).

5. Finally, respondent's argument (Br. 11-14) that his detention is governed by 8 U.S.C. 1231(a)(6) rather than 8 U.S.C. 1226(e) (1994) counsels *in favor of* granting the petition and remanding for further consideration in light of *Zadvydas*. The court of appeals held (Pet. App. 20a-21a) that respondent's detention was authorized by former 8 U.S.C. 1226(e) because respondent was in exclusion proceedings before the April 1, 1997 effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 309(c)(1), 110 Stat. 3009-625. See Pet. App. 20a-21a. It then held Section 1226(e) unconstitutional as applied to respondent. *Id.* at 27a-48a. If it were true, as respondent argues, that *Zadvydas* has implications for the court of appeals' predicate statutory holding, then granting the government's petition would allow the court of appeals to consider the issue in the first instance.

Furthermore, even if 8 U.S.C. 1231(a)(6) were the relevant statutory provision in this case, it would not follow that respondent's detention violates the requirements of that section. Only the dissenting Justices in *Zadvydas* raised the prospect that the construction of Section 1231(a)(6) announced in that case might apply equally to aliens whose situation does not implicate the same constitutional concerns that animated the Court's interpretive approach. See 121 S. Ct. at 2512-2513 (opinion of Kennedy, J., dissenting). The petition explains (at 17-18 n.4) why the statutory analysis of the *Zadvydas* majority does not apply in the case of an excludable alien. Detention of such an alien does not raise the constitutional question that the Court confronted in *Zadvydas*, see 121 S. Ct. at 2498-2502, and continued detention itself accomplishes the purpose of effectively excluding the alien from the United States. There would, moreover, be additional statutory grounds, independent of Section 1231(a)(6) and not addressed by the dissenting Justices in *Zadvydas*, for continuing to detain respondent. See Pet. 18 n.4 (discussing 8 U.S.C. 1182(d)(5)(A)).

* * * * *

The Court should grant the petition for a writ of certiorari, vacate the judgment of the court of appeals, and remand the case to the court of appeals for further consideration of the question of mootness and for further consideration of the merits in light of *Zadvydas* v. *Davis*, 121 S. Ct. 2491 (2001).

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

NOVEMBER 2001

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-5698

REYNERO ARTEAGA CARBALLO,
PETITIONER-APPELLANT

v.

MARK LUTTRELL, WARDEN; AND IMMIGRATION AND NATURALIZATION SERVICE, RESPONDENTS-APPELLEES

[Filed: Nov. 23, 2001]

BEFORE: MARTIN, Chief Judge; BOGGS, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges.

Pursuant to Sixth Circuit I.O.P. 35(c), a majority of Judges of this Court in regular active service have voted to grant the request of a member of this Court for rehearing of this case en banc,

> "The effect of the granting of a hearing en banc shall be to vacate the previous opinion and judgment of this Court, to stay the mandate and to restore the case on the docket sheet as a pending appeal."

Accordingly, it is **ORDERED**, that the previous decision and judgment of this court is vacated, the mandate is stayed and this case is restored to the docket as a pending appeal.

The Clerk will scheduled this case for oral argument as directed by the Court.

ENTERED BY ORDER OF THE COURT

/s/ LEONARD GREEN, Clerk
LEONARD GREEN, Clerk